

A Muslim Registry: The Precursor to Internment?

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Being political scapegoats in the indefinite “war on terror” is the new normal for Muslims in America. With each federal election cycle or terrorist attack in a Western country comes a spike in islamophobia. Candidates peddle tropes of Muslims as terrorists in campaign materials and political speeches to solicit votes. Government officials call for bold measures—extreme vetting, categorical bans, and mass deportations—to regulate and exclude Muslim bodies from U.S. soil. The racial subtext is that Muslims in the United States are outsiders who do not belong to the political community.

A case in point is the “Muslim ban” issued by the Trump administration in 2017. As the ban dominated public debate and litigation, another racialized counterterrorism policy lurked in the backdrop: a Muslim registry. This Article explores the political and legal plausibility of a de jure or de facto Muslim registry. Analyzing separately the case of nonimmigrants, immigrants, and U.S. citizens, the Article concludes that proponents of a nonimmigrant special registration program based on national origin will find support in the law. A registry of immigrants is also possible, though much will depend on whether courts will look to the islamophobic political environment arising from Trump and his advisor’s anti-Muslim statements to apply strict scrutiny; or whether courts will accept facially neutral national security justifications to apply the rational basis test that nearly guarantees the government’s victory. In contrast, a registry of U.S. citizen Muslims is unlikely to pass constitutional muster, as is a special registration program explicitly based on religion.

Separate from the dignitary harms and privacy concerns arising from a Muslim registry are threats to the liberty of millions of people in

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America. A Muslim registry could very well be the precursor to mass internment should another major terrorist attack occur on U.S. soil. For that reason alone, proponents of civil rights and liberties should be prepared to oppose what is no longer unimaginable.

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INTRODUCTION

For Mohammed and Fatima Salem, it was an ordinary Friday evening preparing for dinner. As their children’s gazes oscillated between their smart phones and the television, a public service announcement suddenly captured their attention. A stern voice bellowed out of the

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television that “The President of the United States hereby declares that, to preserve American national security, all Muslims in the United States are required to register at their local post office. Those failing to do so within the next four weeks will be deemed in violation of the law and subject to arrest and fines.” A chilling silence filled the house. The Salem children looked puzzlingly at their parents. Why were only Muslims required to register, asked thirteen-year-old Yusuf. Would the government close their mosques, asked ten-year-old Noura. Were they all going to jail, cried seven-year-old Ali. Mohammed and Fatima had immigrated to the United States thirteen years prior from Yemen, and were waiting to finalize their naturalization. All three U.S.-citizen children spent their entire lives in the United States, where they learned in school that respect for different religions was a fundamental American value. Their textbooks taught them the Constitution granted all people the right to practice their religion without fear. What they heard on television that night, however, shattered those ideals. For the first time in their young lives, Yusuf, Noura, and Ali felt like outsiders in their own country.

* * *

American society is built on racial and religious hierarchies.² Persons deemed “White” and “Christian” are permanently at the top where they receive more opportunities, wealth, and power than groups on the bottom rungs.³ Groups compete to move up the hierarchy with mixed success. Persons of Chinese, Irish, German, and Italian descent, for example, were at one point deemed undesirables in society but later promoted to “model minority” or admitted into Whiteness, respectively.⁴ Similarly, persons of Jewish and Catholic faith

2. See generally DERRICK A. BELL, RACE, RACISM, AND AMERICAN LAW (4th ed. 2000) (noting that American society organizes itself along racial lines); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 2000).

3. See generally Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (providing a landmark work on the property value attached to Whiteness).

4. In the Naturalization Act of 1790, Congress restricted immigrant eligibility for citizenship to “free white person[s]” which effectively excluded all persons of Chinese origin from naturalizing. Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795). See also Page Act of 1875, ch. 141, 18 Stat. 477 (repealed 1974); Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943); Act of April 27, 1904, ch. 1630, sec. 5, 33 Stat. 394, 428 (repealed

once occupied the lowest rungs of the religious hierarchy but were later promoted above Muslims, Hindus, and other faiths in America's newfound Judeo-Christian identity.⁵ All the while, African Americans and Native Americans remain at the bottom of social, political, and economic hierarchies, as evinced by their disproportionate representation among the poor, unemployed, and incarcerated.⁶

In the post-9/11 era, Muslims find themselves among the most distrusted groups in the United States, thereby securing their place near the bottom of the social and political order. Previously an obscure group at the periphery of public discourse, Muslims now purportedly pose an existential threat to the most powerful nation in the world.⁷

1943). In *Chae Chan Ping v. United States*, a unanimous Court reasoned that in light of the "Oriental invasion" posing a "menace to our civilization," if Congress "considers the presence of foreigners of a different race in this country . . . to be dangerous to its peace and security, their exclusion is not to be stayed." *Chae Chan Ping v. United States*, 130 U.S. 581, 595, 606 (1889). Benjamin Franklin famously stated about the Germans in 1753: "Few of their children in the Country learn English . . . [T]he Signs in our Streets have inscriptions in both languages . . . ; unless the stream of their importation could be turned . . . they will soon so out number us, that all the advantages we have will not . . . be able to preserve our language, and even our Government will become precarious." Benjamin Franklin, *Letter to Peter Collinson: The Support of the Poor, May 09, 1753*, TEACHINGAMERICANHISTORY.ORG, <http://teachingamericanhistory.org/library/document/letter-to-peter-collinson> (last visited Nov. 28, 2017); see also DAVID ROEDIGER, *WORKING TOWARD WHITENESS: HOW AMERICA'S IMMIGRANTS BECAME WHITE: THE STRANGE JOURNEY FROM ELLIS ISLAND TO THE SUBURBS* (2005); STACEY J. LEE, *UNRAVELING THE "MODEL MINORITY" MYTH, LISTENING TO ASIAN AMERICAN YOUTH* 120-42 (2d ed. 2009), http://www.faculty.umb.edu/lawrence_blum/courses/CCT627_10/readings/lee_unraveling_model_minority_stereotype.pdf.

5. See THE FBI AND RELIGION: FAITH AND NATIONAL SECURITY BEFORE AND AFTER 9/11 (Sylvester A. Johnson & Steven Weitzman eds., 2017).

6. DEDRICK ASANTE-MUHAMMAD ET AL., CFED & INST. FOR POLICY STUDIES *THE EVER-GROWING GAP: WITHOUT CHANGE, AFRICAN-AMERICAN AND LATINO FAMILIES WON'T MATCH WHITE WEALTH FOR CENTURIES 7-10* (2016); see ASHLEY NELLIS, *THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS* 3-4 (2016), <http://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>; Calvin John Smiley & David Fakunle, *From "Brute" to "Thug:" The Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 J. HUM. BEHAV. SOC. ENV'T 350 (2016); Michael W. Chapman, *White Unemployment, 4.8%—Black Unemployment, 10.4%*, CNS NEWS (Jan. 9, 2015, 11:31 AM), <https://www.cnsnews.com/news/article/michael-w-chapman/white-unemployment-48-black-unemployment-104>.

7. The President has been quoted as saying, "Islam hates us," and "[W]e can't allow people coming into this country who have this hatred of the United States." Theodore Schleifer, *Donald Trump: 'I Think Islam Hates Us'*, CNN, <http://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/index.html> (last updated Mar. 10, 2016, 5:56 PM). Another

Consequently, the U.S. government's heightened focus on national security allocates hundreds of millions of dollars toward surveilling, policing, and expelling Muslims.⁸ Police departments have spent tens of millions of dollars surveilling Muslim students, mosques, and businesses.⁹ The Federal Bureau of Investigations (FBI) regularly conducts aggressive sting operations on young Muslim men, particularly ones suffering from mental health problems, recently released from jail, or facing personal crises.¹⁰ This systemic targeting signals to private actors that otherwise discriminatory actions against Muslims are patriotic, leading to a consistent spike in hate crimes and discrimination.¹¹ The rise in islamophobia has emboldened some elected officials to brazenly call for tracking Muslims as a standard national security practice.¹²

article quoted him as saying, "There is tremendous hate. Where large portions of a group of people, Islam, large portions want to use very, very harsh means . . ." Charlotte Alter, *Muslim Women Say They Don't Need Donald Trump's Help*, TIME (Mar. 11, 2016), <http://time.com/4255987/muslim-women-donald-trump-islam>.

8. See Susan Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609, 617 (2005) (describing post-9/11 policies targeting Muslims). See generally Margaret Hu, *Big Data Blacklisting*, 67 Fla. L. Rev. 1735 (2016) (noting that surveillance is done by the process of "big data blacklisting," categorizing individuals as administratively guilty until proven innocent by virtue of suspicious digital data).

9. *Hassan v. City of New York*, 804 F.3d 277 (3d Cir. 2015); MUSLIM AMERICAN CIVIL LIBERTIES COALITION (MACLC), COUNTERTERRORISM POLICY: MACLC'S CRITIQUE OF THE NYPD'S REPORT ON HOMEGROWN RADICALISM (2008), <https://maclcnypdcritique.files.wordpress.com/2008/11/counterterrorism-policy-final-paper3.pdf>; Samantha Henry, *NJ FBI: NYPD Monitoring Damaged Public Trust*, NBC N.Y., <http://www.nbcnewyork.com/news/local/NJ-FBI-NYPD-Muslim-Spying-Surveillance-141805593.html> (last updated Mar. 8, 2012, 12:14 PM).

10. Trevor Aaronson, *The Unlikely Jihadi*, INTERCEPT (Sept. 3, 2017, 7:05 AM), <https://theintercept.com/2017/09/03/the-fbi-pressured-a-lonely-young-man-into-a-bomb-plot-he-tried-to-back-out-now-hes-serving-life-in-prison>; Aviva Stahl, *NYPD Undercover "Converted" to Islam to Spy on Brooklyn College Students*, GOTHAMIST (Oct. 29, 2015, 2:58 PM), http://gothamist.com/2015/10/29/nypd_undercover_brooklyn.php

11. See Sahar F. Aziz, *Losing the "War of Ideas": A Critique of Countering Violent Extremism Programs*, 52 TEX. INT'L L.J. 255 (2017) (explaining how Countering Violent Extremism programs legitimize discrimination and hate crimes performed by "patriot" groups); see also ENGY ABDELKADER, THE BRIDGE INITIATIVE, WHEN ISLAMOPHOBIA TURNS VIOLENT: THE 2016 U.S. PRESIDENTIAL ELECTIONS (2016), <http://bridge.georgetown.edu/wp-content/uploads/2016/05/When-Islamophobia-Turns-Violent.pdf>; THE BRIDGE INITIATIVE, THE SUPER SURVEY: TWO DECADES OF AMERICANS' VIEWS ON ISLAM & MUSLIMS (2015), <http://bridge.georgetown.edu/wp-content/uploads/pdf/The-Super-Survey.pdf>.

12. Aaron Blake, *Trump Says We've Known His Muslim Ban and Database Plans 'All*

A case in point is the call for a Muslim registry. Some Republican candidates in the 2016 presidential elections, including Donald Trump, unabashedly called for tracking Muslims in the United States.¹³ Such proposals were supported by the same constituents who support a Muslim ban.¹⁴ Indeed, should another major terrorist attack occur on U.S. soil, some politicians will line up to compete for who can be the most extreme in calling for rights-infringing, anti-Muslim policies. While many Americans would like to believe that such concerns are farfetched, special registration was historically used to track and in some cases, deport persons whose national origins were deemed a threat to U.S. national security. This overt government tracking facilitates identifying targets of future internment. As such, serious consideration of a prospective Muslim registry is warranted.

In November 2015, then presidential candidate Donald Trump expressed his willingness to create a database that tracked all Muslims in the United States as a national security measure.¹⁵ He also called for “a total and complete shutdown of Muslims entering the United States,” claiming that “there is great hatred towards Americans by large segments of the Muslim population.”¹⁶ Trump’s incendiary

Along.’ But We Still Don’t—Not Really., WASH. POST (Dec. 21, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/11/17/the-evolution-of-donald-trump-and-the-muslim-database/?utm_term=.993f24aa1741.

13. See, e.g., Tina Nguyen, *Ted Cruz Calls on Police to “Patrol and Secure Muslim Neighborhoods,”* VANITY FAIR: HIVE POL. (Mar. 22, 2016, 5:00 PM), <https://www.vanityfair.com/news/2016/03/ted-cruz-calls-on-police-to-patrol-and-secure-muslim-neighborhoods>.

14. See, e.g., Margaret Hartmann, *Trump Supporter Cites Japanese Internment Camps as ‘Precedent’ for Muslim Registry*, N.Y. MAG. (Nov. 17, 2016, 1:53 AM), <http://nymag.com/daily/intelligencer/2016/11/trump-supporter-muslim-registry-internment-camps.html>.

15. Lauren Carroll, *In Context: Donald Trump’s Comments on a Database of American Muslims*, POLITIFACT (Nov. 24, 2015, 2:39 PM), <http://www.politifact.com/truth-o-meter/article/2015/nov/24/donald-trumps-comments-database-american-muslims>. The interview is available at <http://www.nbcnews.com/politics/2016-election/trump-says-he-would-certainly-implement-muslim-database-n466716>.

16. Press Release, Donald J. Trump Presidential Campaign, Donald J. Trump Statement on Preventing Muslim Immigration (Dec. 7, 2015) (originally published on donaldjtrump.com, later removed from the website, but available at <https://web.archive.org/web/20151207230751/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration>); see also Jose A. DelReal, *Trump Campaign Staff Redirects, Then Restores, Mention of Muslim Ban from Website*, WASH. POST (Nov. 10, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/11/10/trump-campaign-staff-deletes-mention-of-muslim-ban-from-website> (noting Trump’s statements targeting the entry of Muslims to the United States).

statements against Islam over the course of two years coupled with his executive orders in 2017 barring millions of Muslims from entering the United States reveal a desire to exclude and surveil Muslims en masse. The Trump administration has no qualms in collectively punishing Muslims for real or imaginary national security threats.

Although calls for a Muslim registry may seem farfetched or mere political theater, President Trump's executive order banning nationals from seven (later changed to six and then to five) Muslim-majority countries is a troubling harbinger. So, too, is the precedent set by the National Security Entry Exit System (NSEERS) mandating registration for nonimmigrant males from twenty-four Muslim majority countries.¹⁷ Should another major terrorist attack occur in the United States, calls to track all Muslims through a special registration program are likely to dominate mainstream media and congressional hearings.¹⁸ Reckless politicians will exploit the terrorist attack to pedal islamophobia for votes.¹⁹

Accordingly, this Article examines the legal and policy implications should a Muslim registry be implemented. In doing so, it seeks to forewarn advocates, policymakers, and people opposed to the Muslim ban to be prepared for this plausible next phase in the Trump administration's anti-Muslim political agenda.²⁰ Notably, the scope of

17. See *infra* note 113 and accompanying text.

18. In the months immediately following the 9/11 attacks, approximately one third of Americans agreed that Americans of Arab descent should be interned until their innocence could be proven. Deborah J. Schildkraut, *The Dynamics of Public Opinion on Ethnic Profiling After 9/11: Results from a Survey Experiment*, 53 AM. BEHAV. SCIENTIST 65 (2009), <http://journals.sagepub.com/doi/abs/10.1177/0002764209338786>; see also Lynette Clemetson, *Civil Rights Commissioner Under Fire for Comments on Arabs*, N.Y. TIMES, July 23, 2002, at A14 ("If there's another terrorist attack, and if it's from a certain ethnic community or certain ethnicities that the terrorists are from, you can forget civil rights in this country.") (quoting the chair of the U.S. Commission on Civil Rights)). Sixty years prior, the bombing of Pearl Harbor set into motion the internment of approximately 126,000 persons of Japanese ancestry, including U.S. citizens. ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE INTERMENT 103 (2d ed. 2013).

19. Eugene Scott, *Ted Cruz: Program Patrolling Muslim Neighborhoods Was a Success*, CNN POL. (Mar. 30, 2016, 12:52 PM), <http://www.cnn.com/2016/03/30/politics/ted-cruz-muslim-neighborhoods/index.html>; Scott Shane, *In Islamic Law, Gingrich Sees a Mortal Threat to U.S.*, N.Y. TIMES (Dec. 21, 2011), <http://www.nytimes.com/2011/12/22/us/politics/in-shariah-gingrich-sees-mortal-threat-to-us.html>.

20. *Interactive Timeline: Trump on Muslims & The Muslim Ban*, BRIDGE INITIATIVE (Oct. 22, 2017 1:58 AM), <http://bridge.georgetown.edu/words-trump-muslims-muslim-ban>.

analysis is limited to persons in the United States who are out of status, nonimmigrants (temporary visas), immigrants (legal permanent residents), and U.S. citizens. It does not include persons outside the United States seeking entry on a nonimmigrant or immigrant visa for the first time, also known as initial entrants.²¹

Because past special registries of nonimmigrants and immigrants based on national origin have been upheld as constitutional by U.S. courts, the government is likely to use nationality as a proxy for religion.²² Should the government seek to register U.S. citizens, however, it will have to convince the courts that an American's ancestry determines her loyalty—a move that, if successful, would negate decades of progress on racial justice.²³ The overt rise of White supremacy in American politics coupled with the fact that *Korematsu* has not been officially overruled by the U.S. Supreme Court suggests that a special registration of U.S. citizens based on race is neither a legal nor political impossibility.²⁴

A special registry of persons within the U.S. based solely on religion, however, is unlikely to withstand constitutional challenges.²⁵

21. *But see* *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring) (noting that visa revocations or denials that implicate constitutional rights must be supported by “a facially legitimate and bona fide” reason” (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972))).

22. *See* *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (noting power to control the admission of aliens is an inherent attribute of national sovereignty); Kathryn Lohmeyer, Note, *The Pitfalls of Plenary Power: A Call for Meaningful Review of NSEERS “Special Registration,”* 25 WHITTIER L. REV. 139, 157 (2003) (noting that clear precedent for the creation of NSEERS was created with *Nareji v. Civiletti*, 617 F.2d 745 (1979)).

23. *See* *Hirabayashi v. United States*, 320 U.S. 81 (1943) (accepting the government's argument that U.S. citizen plaintiff's Japanese ancestry compromised his loyalty to the United States).

24. PETER IRONS, JUSTICE DELAYED: THE RECORD OF THE JAPANESE INTERNMENT CASES 27–45 (1989) (noting that Judge Patel in the *Korematsu coram nobis* case could not, as a matter of law, reverse the Supreme Court opinion of 1944); Jonah Engel Bromwich, *Trump Camp's Talk of Registry and Japanese Internment Raises Muslims' Fears*, N.Y. TIMES (Nov. 17, 2016), <https://www.nytimes.com/2016/11/18/us/politics/japanese-internment-muslim-registry.html>; Lauren Meltzer & Tony Dokoupil, *Hate Rising: White Supremacy's Rise in the U.S.*, CBS NEWS (Aug. 22, 2017, 12:22 AM), <https://www.cbsnews.com/news/hate-rising-cbsn-on-assignment>.

25. *See* *Rajah v. Mukasey*, 544 F.3d 427, 433 (2d Cir. 2008) (holding that a selective prosecution based on religious animus would call for some remedy under the Due Process Clause); Karen C. Tumlin, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 CALIF. L. REV. 1172, 1184 (2004) (arguing that, post-9/11, the U.S. government engages

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For that reason, the Executive will cite national security as the justification for a national origin based program that has the effect of targeting Muslim individuals.²⁶ Opponents will have to persuade the courts to look behind facially neutral justifications on national security grounds to determine that the government's actual motive is religious animus, making the national-origin criteria unlawful pretext.²⁷ As demonstrated in the Muslim ban cases, proving unlawful animus is easier under an administration whose hostility toward Muslims is explicit.²⁸ In that regard, the Trump administration is at a disadvantage as compared to previous administrations whose political rhetoric proclaiming Islam is a religion of peace provided political cover for their foreign and domestic counterterrorism practices selectively targeting Muslims.²⁹

in immigration-plus profiling that “conflates nationality with religion and targets immigrants from nations with sizable Muslim populations for selective enforcement of immigration laws”).

26. Trump's executive proclamation, issued on September 24, 2017, did just that by focusing on security risks and threat assessments arising from five countries (Yemen, Iran, Somalia, Libya, and Syria) without mentioning Islam or Muslims in the text. Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017), <https://www.whitehouse.gov/the-press-office/2017/09/24/enhancing-vetting-capabilities-and-processes-detecting-attempted-entry>.

27. *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017); *Arab Am. Civil Rights League v. Trump*, No. 17-10310, 2017 WL 2501060, at *7-8, (E.D. Mich. June 9, 2017); *Sarsour v. Trump*, 245 F. Supp. 3d 719, 728-30 (E.D. Va. 2017); *Int'l Refugee Assistance Project (IRAP) v. Trump*, 241 F. Supp. 3d 539, 550 (D. Md.), *aff'd in part and vacated in part*, 857 F.3d 554 (4th Cir.), *vacated*, No. 16-1436, 2017 WL 4518553 (U.S. Oct. 10, 2017); *Hawai'i v. Trump*, 241 F. Supp. 3d 1119, 1132 (D. Haw. 2017).

28. *Washington v. Trump*, 847 F.3d at 1151; *Arab Am. Civil Rights League v. Trump*, No. 17-10310, 2017 WL 2501060 (E.D. Mich. June 9, 2017); *Sarsour v. Trump*, 245 F. Supp. 3d 719; *IRAP v. Trump*, 245 F. Supp. 3d 719; *Hawai'i v. Trump*, 241 F. Supp. 3d 1119.

29. Despite President Bush's statements that, “Islam is a religion of peace,” his national security policies at home and abroad treated Muslims as inherently suspect of terrorism. George W. Bush, President, U.S., Remarks at Islamic Center of Washington, D.C.: “Islam is Peace” (Sept. 17, 2001), <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010917-11.html>; see Sahar F. Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 GONZ. L. REV. 429 (2011) (describing in detail the myriad national security practices that infringed on rights of Muslims in America). Similarly, President Obama went on the record multiple times confirming that Islam is a peaceful religion, but continued Bush's rights-infringing national security practices targeting Muslims. Frank James, *On National Security, Obama Follows Bush's Lead*, NPR (June 6, 2013, 6:24 PM), <http://www.npr.org/sections/itsallpolitics/2013/06/06/189266242/on-national-security-obama-follows-bush-s-lead>; Barack Obama, President, U.S., Remarks in Address to the United Nations General Assembly (Sept. 24, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/09/24/remarks-president-obama-address-united-nations-general-assembly> (arguing against a clash of civilization between Western countries and Muslim societies).

Without foreign citizenship as the eligibility criterion, the government would be hard pressed to find another lawful proxy for religion that sweeps in all Muslims in the United States. Not only is it impracticable to identify all Muslims due to a lack of census data and individuals refraining from self-identification, but the Constitution would bar it.³⁰ Short of a judicially accepted executive report finding a military necessity to register Muslims—similar to the now discredited DeWitt Report during Japanese internment—special registration of Muslim U.S. citizens may be a legal nonstarter.³¹ Should such a report surface, the courts would apply strict scrutiny to determine if a Muslim registry is narrowly tailored to meet the government’s compelling national security interests. The outcome would depend in large part on the composition of the Supreme Court and the political environment at the time.³²

I. THE POLITICS OF SURVEILLANCE OF MUSLIMS POST-9/11

While surveillance of minority groups long predated 2001, the 9/11 terrorist attacks triggered myriad forms of surveillance targeting Muslims.³³ Ranging from electronic and physical surveillance of Muslim leaders, organizations, and businesses by the government to private actors reporting suspicious activity about their Muslim neighbors, clients, and co-workers, America’s racialized counterterrorism regime is grounded in the premise that Muslims

30. See generally *A Brief History of Religion and the U.S. Census*, PEW RES. CTR. (Jan. 26, 2010), <http://www.pewforum.org/2010/01/26/a-brief-history-of-religion-and-the-u-s-census>.

31. YAMAMOTO ET AL., *supra* note 18, at 4 (noting the DeWitt report was based on a factual record deliberately fabricated in key parts by high U.S. government officials and lawyers).

32. See Jeffrey Toobin, *Trump’s Real Personnel Victory: More Conservative Judges*, NEW YORKER (Aug. 2, 2017), <https://www.newyorker.com/news/daily-comment/trumps-real-personnel-victory-more-conservative-judges> (noting that Trump’s nominations to the federal bench, if confirmed, will push the judiciary to the right politically).

33. See generally SIMONE BROWNE, *DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS* (2015) (describing the extensive history of policing black life under slavery, branding, runaway slave notices, Jim Crow laws, and currently through technology).

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are suspects who must be tracked.³⁴ Special registration is a key component of this racial project.³⁵

Donald Trump's endorsement of a registry for Muslims began in November 2015 when he was asked by a reporter, "Do you think we might need to register Muslims in some type of database, or note their religion on their ID?"³⁶ Trump responded, "There should be a lot of systems, beyond databases, we should have a lot of systems, and today you can do it."³⁷ He confirmed his approval of government officials going to mosques to "sign these people up."³⁸ He acknowledged, "Different places, you sign them up at different, but it's all about management, our country has no management."³⁹ After being subjected to a backlash of criticism, Trump recanted on Twitter: "I didn't suggest a database—a reporter did. We must defeat

34. Jerry Markon, *Mosque Infiltration Feeds Muslims' Distrust of FBI*, WASH. POST, Dec. 5, 2010, at A01, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/04/AR2010120403720.html> (reporting on how the FBI's use of a mosque infiltrator backfired); Thomas Watkins, *Suit Claims FBI Violates Muslims' Rights at Mosque*, POLICE ONE (Feb. 26, 2011), <https://www.policeone.com/legal/articles/3378726-Suit-claims-FBI-violates-Muslim-s-rights-at-mosque> ("Plaintiffs in a lawsuit against the FBI said . . . that the agency's use of a paid informant to infiltrate California mosques has left them and other Muslims with an enduring fear that their phones and e-mails are being screened and their physical whereabouts monitored."); see also Philip Bump, *Ted Cruz Wants to Nationalize an NYPD Muslim Surveillance Program that the NYPD Says Didn't Work*, WASH. POST (Mar. 23, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/03/23/ted-cruz-wants-to-nationalize-an-nypd-muslim-surveillance-program-that-the-nypd-says-didnt-work>; Salvador Hernandez, *Judge: FBI Lied, But Documents About Muslims Stay Secret*, ORANGE COUNTY REG. (Apr. 29, 2011, 1:14 PM), <http://www.ocregister.com/articles/documents-298500-fbigovernment.html> ("Documents connected to [FBI] surveillance of several Islamic organizations and Muslim leaders will not be released, but a federal judge strongly rebuked the government for lying about the existence of the documents to the federal court.").

35. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 125 (3d ed. 2015) ("A racial project is simultaneously an interpretation, representation, or explanation of racial identities and meanings, and an effort to organize and distribute resources (economic, political, cultural) along particular racial lines.").

36. Carroll, *supra* note 15.

37. Alana Abramson, *What Trump Has Said About a Muslim Registry*, ABC NEWS (Nov. 18, 2016, 7:00 PM), <http://abcnews.go.com/Politics/trump-muslim-registry/story?id=43639946>.

38. *Id.*

39. *Id.* ("We're going to have to look at a lot of things very closely. We're going to have to look at the mosques . . . very, very carefully.")

Islamic terrorism & have surveillance, including a watch list, to protect America.”⁴⁰

In the following days, Trump maintained that he did not suggest the database, but in an interview with George Stephanopoulos on ABC News’s *This Week* on November 22, 2015, Trump stated he was not ruling out the possibility of a database of Muslims:

I want a database for the refugees that—if they come in the country. We have no idea who these people are. When the Syrian refugees are going to start pouring into this country, we don’t know if they’re ISIS, we don’t know if it’s a Trojan horse. And I definitely want a database and other checks and balances. We want to go with watch lists. We want to go with databases. And we have no choice.⁴¹

Throughout the twelve months prior to the presidential elections, Trump made clear his deep suspicion of Muslims as terrorists or terrorist supporters.⁴² For instance, he stated that it is “hard to separate . . . who is who” between Muslims and terrorists.⁴³ He insisted that “hundreds of thousands of refugees from the Middle East” would attempt to “take over” and radicalize “our children.”⁴⁴ Trump warned that Syrian refugees would “be a better, bigger, more horrible version than the legendary Trojan Horse.”⁴⁵ And when he

40. *Id.*; Donald J. Trump (@realDonaldTrump), TWITTER, (Nov. 20, 2015, 10:51 AM), <https://twitter.com/realDonaldTrump/status/6677773480292544>.

41. Carroll, *supra* note 15. *But see* Brief of Former National Security Officials as Amici Curiae Supporting Petitioners, *Darweesh v. Trump*, No. 1:17-CV-00480 (E.D.N.Y. Feb. 16, 2017) [hereinafter *Darweesh Case Amici Brief*] (arguing that refugees receive the most thorough vetting of all entrants into the United States).

42. See Jenna Johnson & Abigail Hauslohner, *‘I Think Islam Hates Us’: A Timeline of Trump’s Comments About Islam and Muslims*, WASH. POST (May 20, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims>.

43. *Anderson Cooper 360°* (CNN television broadcast Mar. 9, 2016) (transcript available at <http://cnn.it/2jJmaEC>).

44. *Donald Trump Remarks in Manchester, New Hampshire* 20:05 (C-SPAN June 13, 2016), <http://cs.pn/2k7bHGq>.

45. Emily Schultheis, *Donald Trump Warns Refugees Could be “Trojan Horse” for U.S.*, CBS NEWS (June 13, 2016, 4:00 PM), <https://www.cbsnews.com/news/donald-trump-warns-refugees-could-be-trojan-horse-for-u-s>.

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“talked about the Muslims,” he reiterated: “[W]e have to have a ban . . . it’s gotta be a ban.”⁴⁶

In March 2016, Trump responded to a journalist asking him if he believed that “Islam is at war with the U.S.,” saying, “I think Islam hates us. . . . There’s an unbelievable hatred of us. . . . [T]here is a tremendous hatred and we have to be very vigilant and we have to be very careful and we can’t allow people coming into this country who have this hatred of the United States and of people who are not Muslim.”⁴⁷ In July 2016, Trump admitted that he reframed his ban to target “territory instead of Muslim,” which he praised as an “expansion” rather than “rollback.”⁴⁸ In October 2016, Trump disclosed that “[t]he Muslim ban . . . ha[d] morphed into extreme vetting from certain areas of the world.”⁴⁹

After the June 2016 mass shooting in Orlando, Florida, Trump announced plans to suspend immigration from countries with a history of terrorism.⁵⁰ Subsequently, Trump referred to his plan as a “Muslim ban,” which would require “extreme vetting.”⁵¹ By referring to the ban as specifically targeting a particular religious group, Trump admitted that his executive order was intended to function as an immigration ban based on religious identity.⁵² Indeed, as he prepared

46. *Presidential Candidate Donald Trump Town Hall Meeting in Londonderry, New Hampshire* 28:16 (C-SPAN Feb. 8, 2016), <http://cs.pn/2kY4f1T>.

47. *Anderson Cooper 360°: Trump One-on-one* (CNN television broadcast Mar. 9, 2016), <http://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/index.html>; *see also* *Ali v. Trump*, 241 F. Supp. 3d 1147, 1149 (W.D. Wash. 2017) (documenting anti-Muslim statements by Trump as presidential candidate and U.S. President).

48. *Meet the Press* (NBC NEWS July 24, 2016) (transcript available at <http://nbcnews.to/29TqPnp>).

49. *Hawai’i v. Trump*, 241 F. Supp. 3d 1119, 1136–37 (D. Haw. 2017).

50. *See* Donald J. Trump, *Donald J. Trump Addresses Terrorism, Immigration, and National Security*, FACEBOOK (June 13, 2016), <https://www.facebook.com/DonaldTrump/posts/10157163861635725:0> (“I will suspend immigration from areas of the world where there is a proven history of terrorism against the United States, Europe, or our allies until they understand how to end these threats.”).

51. *See* Elise Foley, *Donald Trump Says His Muslim Ban Has ‘Morphed’ Into ‘Extreme Vetting,’* HUFFPOST (Oct. 9, 2016, 10:59 PM), http://www.huffingtonpost.com/entry/presidential-debate-syrian-refugees_us_57e9820fe4b08d73b832e76a (quoting Trump during a presidential debate).

52. Donald J. Trump (@realDonaldTrump), *Statement on Preventing Muslim Immigration*, TWITTER, (Dec. 7, 2015, 2:32 PM), <https://twitter.com/realdonaldtrump>

to sign the first executive order, President Trump stated, “This is the ‘Protection of the Nation from Foreign Terrorist Entry into the United States.’ We all know what that means.”⁵³ By that time, it was no secret that Trump equated terrorists with Islam.

To sidestep a backlash against a registry of people based on their religion—a concept antithetical to American values of equal protection and religious freedom—Trump used the term “extreme vetting” as a moniker for smart counterterrorism.⁵⁴ Trump reassured his right wing base at a rally that “extreme vetting” would ensure the U.S. only accepts “the right people,” using “ideological certification to make sure that those we are admitting to our country share our values and love our people.”⁵⁵

Trump’s broader anti-immigrant agenda, although primarily targeting Latinos, encompassed excluding and deporting Muslims.⁵⁶ During a speech in Ohio in August of 2016, Trump called for the suspension of visas from countries with ties to terrorism and proposed a test designed to determine if individuals entering the United States from these countries support American values.⁵⁷

/status/673993417429524480. The statement to which Trump’s tweet referred has since been removed from his campaign site. See Jessica Estepa, ‘Preventing Muslim Immigration’ Statement Disappears from Trump’s Campaign Site, USA TODAY (May 8, 2017, 3:32 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2017/05/08/preventing-muslim-immigration-statement-disappears-donald-trump-campaign-site/101436780>.

53. Amy Davidson Sorkin, *Trump’s “Travel Ban” Tweets Show His Disdain for His Lawyers*, NEW YORKER (June 5, 2017), <http://www.newyorker.com/news/amy-davidson/trumps-travel-ban-tweets-show-his-disdain-for-the-law>.

54. ICE-HSI, EXTREME VETTING INITIATIVE: STATEMENT OF OBJECTIVES (SOO) (2017), <http://www.brennancenter.org/sites/default/files/Extreme%20Vetting%20Initiate%20-%20Statement%20of%20Objectives.pdf>; see ACLU, THE TRUMP MEMOS: THE ACLU’S CONSTITUTIONAL ANALYSIS OF THE PUBLIC STATEMENTS AND POLICY PROPOSALS OF DONALD TRUMP 5 (2016), https://www.aclu.org/sites/default/files/field_document/aclu-trump-memos.pdf (noting that Trump may attempt to disguise the “Muslim ban” as something else); April Glaser, *ICE Wants to Use Predictive Policing Technology for Its “Extreme Vetting” Program*, SLATE (Aug. 8, 2017, 1:40 PM), http://www.slate.com/blogs/future_tense/2017/08/08/ice_wants_to_use_predictive_policing_tech_for_extreme_vetting.html.

55. Los Angeles Times Staff, *Transcript: Donald Trump’s Full Immigration Speech, Annotated*, L.A. TIMES (Aug. 31, 2016, 9:35 PM).

56. César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 287–88 (2017).

57. See Courtney Subramanian, *US Election: Who Will Be Banned Under Trump’s Immigration Plan?*, BBC NEWS (Aug. 16, 2016), <http://www.bbc.com/news/world-us-canada-37086579> (noting that he would “ask the State Department and Department of

The Extreme Vetting Initiative will apply predictive policing methods to determine which prospective immigrants are at risk of committing terrorist acts.⁵⁸ Factors may include an immigrant's religious practices, political views, and national origin. In effect, extreme vetting is an ideological and religious test designed specifically for Muslims. Immigration officials would ask those entering the United States questions about their views on freedom of religion, gender equality, and gay rights, which along with personal interviews of the individual's family or friends would determine a Muslim's admissibility.⁵⁹ As such, civil rights and liberties groups have criticized the program as a "digital Muslim ban."⁶⁰

That a significant number of Americans support exclusion of Muslims from the United States further emboldened President Trump and other presidential candidates.⁶¹ In an online poll on June 17, 2016, Reuters found that 45.2% of Americans were in favor of a ban on Muslims, 45% disagreed with the ban, and 9.8% were undecided.⁶² Eight months later in a Quinnipiac University poll released on February 7, 2017, only 51% of American voters opposed Trump's January 27, 2017 executive order barring tens of millions of Muslims from entering the United States.⁶³ Thus, President Trump

Homeland security [sic] to identify regions where adequate screenings cannot take place").

58. See *supra* note 54.

59. See *supra* note 54; *Donald Trump Calls for 'Extreme Vetting' of Immigrants to US*, BBC NEWS (Aug. 16, 2016), <http://www.bbc.com/news/election-us-2016-37086578> (describing Trump's proposed ideological test for immigrants); Evelyn Rupert, *Trump Supporter Cites Japanese Internment Camps as 'Precedent' for Muslim Registry*, HILL (Nov. 16, 2016, 11:26 PM), <http://thehill.com/blogs/ballot-box/306508-trump-supporter-cites-japanese-internment-camps-as-precedent-for-muslim>.

60. Michelle Mark, *The Trump administration's extreme vetting plan is being blasted as a 'digital Muslim ban.'* BUS. INSIDER (Nov. 18, 2017, 12:17 AM), <http://www.businessinsider.com/trumps-extreme-vetting-initiative-digital-muslim-ban-2017-11>.

61. Murtaza Hussain, *Majority of Americans Now Support Donald Trump's Proposed Muslim Ban, Poll Shows*, INTERCEPT (Mar. 30, 2016 11:53 AM), <https://theintercept.com/2016/03/30/majority-of-americans-now-support-trumps-proposed-muslim-ban-poll-shows>.

62. *Agree/Disagree: The United States Should Temporarily Stop All Muslims from Entering the United States*, REUTERS (June 17, 2016), http://polling.reuters.com/#!poll/TM923Y16_4/type/smallest/dates/20160501-20160617/collapsed/true/spotlight/1.

63. Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017); QUINNIPIAC UNIV., AMERICAN VOTERS OPPOSE TRUMP IMMIGRATION BAN, QUINNIPIAC UNIVERSITY NATIONAL POLL FINDS; BIG GENDER GAP AS VOTERS DISAPPROVE OF TRUMP (2017), https://poll.qu.edu/images/polling/us/us02072017_U27bhrqt.pdf; see also Mark Hensch, *Poll: More Than*

had a popular mandate when he ordered an indefinite halt to admission of Syrian refugees, temporary suspension of admissions for other refugees, and a bar on entry of immigrant and nonimmigrant nationals from Syria, Iraq, Yemen, Libya, Somalia, Iran, and Sudan.⁶⁴ Notably, support for Trump's immigration ban fell squarely along party lines.⁶⁵ An IPSO/Reuters poll conducted in January 2017 reported that 53% of Democrats strongly disagreed with the ban.⁶⁶ In contrast, 51% of Republicans "strongly agree[d]" with the ban.⁶⁷

With Congress and the White House firmly within the control of a Republican party supportive of a Muslim ban, a special registration program for Muslims is not as politically implausible as some Americans would like to believe.⁶⁸ Indeed, many Republican political candidates engage in Muslim bashing to attract a growing number of

Half Oppose Trump Travel Ban, HILL (Feb. 7, 2017 2:46 PM), <http://thehill.com/home-news/administration/318330-poll-over-half-oppose-trump-travel-ban> (stating that more than half of voters oppose a ninety-day ban of travelers from Muslim-majority nations).

64. Liam Stack, *Trump's Executive Order on Immigration: What We Know and What We Don't*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/trump-refugee-ban-muslim-executive-order.html>; see also *Full Executive Order Text: Trump's Action Limiting Refugees Into the U.S.*, N.Y. TIMES (Jan. 27, 2017), <https://www.nytimes.com/2017/01/27/us/politics/refugee-muslim-executive-order-trump.html>. See generally Fatma E. Marouf & Deborah Anker, *Socioeconomic Rights and Refugee Status: Deepening the Dialogue Between Human Rights and Refugee Law*, 103 AM. J. INT'L L. 784, 785 (2009) (noting that refugee law differs from human rights law in that it provides surrogate state protection, rather than monitoring human rights abuse and holding a state of origin accountable).

65. William Gallo, *Trump Supporters See 'No Problem' With Travel Ban*, VOA (Feb. 6, 2017 7:07 AM), <http://www.voanews.com/a/donald-trump-supporters-no-problem-travel-ban/3705449.html> (noting that 45% of people approve of the ban and 51% of people disapprove of the ban, "sharply divided along party lines").

66. IPSOS PUBLIC AFFAIRS, *IPOSOS/REUTERS POLL DATA* (2017), https://www.ipsos.com/sites/default/files/2017-02/Immigration_Ban-Jan_2017.pdf.

67. *Id.*; see also Philip Bump, *Marco Rubio Downplays Muslim Discrimination. So Do Many Republicans.*, WASH. POST (Feb. 7, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/02/07/marco-rubio-downplays-muslim-discrimination-as-do-many-republicans>.

68. Aaron Blake, *Whip Count: Here's Where Republicans Stand on Trump's Controversial Travel Ban*, WASH. POST (Jan. 31, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/heres-where-republicans-stand-on-president-trumps-controversial-travel-ban>. But see Julie Pace & Jill Colvin, *Trump Rivals Decry His Call for Registering US Muslims*, SEATTLE TIMES (Nov. 20, 2015, 7:28 AM), <http://www.seattletimes.com/nation-world/nation-politics/trump-wants-database-of-muslims-in-u-s-carson-ratchets-up-rhetoric-too> (stating that the ban proposal was deemed unconstitutional by legal experts).

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far-right voters.⁶⁹ Combined with over sixteen years of selective counterterrorism practices that legitimize racialized notions of Muslims as a threat to national security, state sanctioned islamophobia has produced a political climate hostile to Muslims. The extent to which this political climate will influence the judiciary's legal analysis of a prospective Muslim registry remains an open question.⁷⁰ A look at past special registration programs is instructive.

II. THE CHECKERED HISTORY OF NATIONAL ORIGIN BASED SPECIAL REGISTRATION PROGRAMS

America has a checkered history of national origin based special registration programs.⁷¹ Registration of foreign nationals dates back to the eighteenth century starting with the Naturalization Act of 1798 that required all entering aliens to register with the government.⁷² By the late 1800s, Chinese immigrants were of special concern to the U.S. government.⁷³ As a result, the 1892 Geary Act required noncitizens of Chinese origin to register and extended the Chinese Exclusion Act that barred Chinese nationals from applying for U.S. citizenship.⁷⁴ Xenophobia against Chinese nationals, many of whom came to the U.S. to build the railroads, was rising to such levels that politicians

69. Amitabh Pal, *What's Behind the GOP's Muslim Bashing?*, PROGRESSIVE (Sept. 25, 2015), <http://progressive.org/op-eds/behind-gop-s-muslim-bashing>.

70. Alan Hunt, *The Theory of Critical Legal Studies*, 6 OXFORD J. LEGAL STUD. 1 (1986).

71. See ANDORRA BRUNO, CONG. RESEARCH SERV., DOMESTIC SOC. POLICY DIV., IMMIGRATION: ALIEN REGISTRATION 3 (2004); Jorge Encinas, *There's a Long, Ignominious Trail of Bans, Registries and Forced Relocation*, NPR (Feb. 2, 2017, 8:27 PM), <http://www.npr.org/sections/codeswitch/2017/02/02/512903229/theres-a-long-ignominious-trail-of-bans-registries-forced-relocation>.

72. Naturalization Act of 1798, ch. 54, 1 Stat. 566 (repealed 1802); YAMAMOTO ET AL., *supra* note 18, at 33.

73. YAMAMOTO ET AL., *supra* note 18, at 33. Suspicions of Chinese as disloyal continued well into the twentieth century. See Eric K. Yamamoto, *White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 L. & CONTEMP. PROBS. 285 (2005)

74. Geary Act, ch. 60, § 7, 27 Stat. 25, 26 (1892); McCreary Amendment, ch. 14, § 2, 28 Stat. 7, 8 (1893). The Geary Act was upheld by the U.S. Supreme Court in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). For an exploration of the similarities between the debates culminating in the Chinese exclusion laws and President Trump's immigration initiatives, see Stuart Chinn, *Trump and Chinese Exclusion: Contemporary Parallels with Legislative Debates over the Chinese Exclusion Act of 1882*, 84 TENN. L. REV. 681 (2017).

sought ways to push them back to China. Special registration was a tool of stigmatization aimed to make Chinese nationals feel sufficiently unwelcome to cause them to leave the U.S.⁷⁵

In 1940, The Alien Registration Act (also known as the Smith Act) was enacted to calm fears of a subversive overthrow of the United States government by communists.⁷⁶ The Smith Act was a pre-war-time registration law aimed at expelling political subversives and communists, and in turn became the centerpiece of several national security prosecutions during the Cold War.⁷⁷ The Smith Act required nearly all noncitizens, including permanent residents, to register at a post office and submit to fingerprinting to allow immigration authorities to inventory information about individuals suspected of espionage or subversive threats.⁷⁸ The Act prohibited the creation or circulation of printed material advocating the overthrow of the U.S. government.⁷⁹ This requirement applied to both initial entrants to the United States and noncitizens already present regardless of immigration status.⁸⁰ Those who registered had to update their current address every ninety days or face imprisonment and fines.⁸¹

75. Chinn, *supra* note 74.

76. See Joshua Azriel, *Five Years After the 9/11 Terrorist Attacks: Are New Sedition Laws Needed to Capture Suspected Terrorists in the United States?*, 6 CONN. PUB. INT. L.J. 1, 13 (2006).

77. The U.S. government prosecuted associations with groups inclined to advocate the overthrow or disruption of the United States system, such as membership in the Communist Party. See, e.g., *Scales v. United States*, 367 U.S. 203 (1961); *Dennis v. United States*, 341 U.S. 494 (1951).

78. See Alien Registration (Smith) Act of 1940, ch. 439, § 30, 54 Stat. 670, 673 (repealed 1952); Nancy Morawetz & Natasha Fernandez-Silber, *Immigration Law and the Myth of Comprehensive Registration*, 48 U.C. DAVIS L. REV. 141, 156 (2014). *Yates v. United States* later heightened the burden of prosecution for association, requiring the government to prove not only advocacy of abstract doctrine to overthrow the government, but also advocacy of action. This case ended the utilization of the Smith Act in relation to the criminalization of Communist Party leaders. See *Yates v. United States*, 354 U.S. 298 (1957); see also David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2573 (2003).

79. See Azriel, *supra* note 76.

80. *Id.*

81. *Id.* Expanding registration to all aliens, the Internal Security Act of 1950 required annual registration and 10-day notification of change of address requirements of all aliens. Internal Security Act of 1950, ch. 1024, § 24, 64 Stat. 987 (1950).

Nearly a decade later, between World War I and World War II, citizens suspected of subversive political views, including those of Japanese, German, and Italian origin, were required to register with the government.⁸² In contrast to the individualized determinations afforded to Italian and German nationals, the special registration of persons of Japanese ancestry resulted in mass internment of U.S. citizens and Japanese nationals who were prohibited by law from naturalizing.⁸³ That all three groups of nationals were citizens of enemy states, and yet the Japanese were treated substantially worse, speaks volumes about the role of race in national security enforcement.

Notably, none of the past special registration programs explicitly used religion to determine an individual's eligibility. Instead, targeted persons were nationals of China, Japan, Italy, Germany, and Iran because their imputed collective threat was associated more with their race and national origin than their religious identities, although the two are intertwined.⁸⁴ Had a religious test been used, the special registration program would have likely been struck down by a court as violating the Establishment Clause of the First Amendment, as discussed further in section IV.A.⁸⁵

82. Alien Registration (Smith) Act of 1940, ch. 439, § 30, 54 Stat. 670, 673 (repealed 1952); Ty S. Wahab Twibell, *The Road to Internment: Special Registration and Other Human Rights Violations of Arabs and Muslims in the United States*, 29 VT. L. REV. 407, 411 (2005); *Japanese, German, and Italian American Enemy Alien Internment*, TEX. HIST. COMMISSION, <http://www.thc.texas.gov/preserve/projects-and-programs/military-history/texas-world-war-ii/japanese-german-and-italian> (last visited Jan. 2, 2018); David A. Taylor, *During World War II, the U.S. Saw Italian-Americans as a Threat to Homeland Security*, SMITHSONIAN.COM (Feb. 2, 2017), <http://www.smithsonianmag.com/history/italian-americans-were-considered-enemy-aliens-world-war-ii-180962021>.

83. *Hirabayashi v. United States*, 320 U.S. 81 (1943) (noting that two-thirds of the 126,000 persons of Japanese descent subject to curfews were U.S. born citizens); YAMAMOTO ET AL., *supra* note 18, at 9, 99; *see also* IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (2006) (discussing the bars on naturalization of persons deemed to be Asian by law).

84. *See* Sahar F. Aziz, *From the Oppressed to the Terrorist: Muslim American Women Caught in the Crosshairs of Intersectionality*, 9 HASTINGS RACE & POVERTY L.J. 191 (2012) (arguing that racialization of Islam contributes toward the government's adverse disparate treatment of Muslims and the public's violation of Muslims' civil rights).

85. *See* *Larson v. Valente*, 456 U.S. 228, 255 (1982); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Although the comprehensive registration programs were eventually rescinded,⁸⁶ targeted national origin based registration of noncitizens returned, but this time focusing on persons of Middle Eastern origin. After the 1979 Iranian Revolution and the subsequent hostage crisis, President Carter issued Executive Order 12170, declaring a national emergency arising from the Iran hostage crisis. When Iranian college students occupied the U.S. Embassy in Tehran, leading to the hostage crisis, their counterparts in the U.S. were swept into a dragnet of suspicion and surveillance.⁸⁷ President Carter determined the hostage crisis constituted “an unusual and extraordinary threat to the national security, foreign policy and economy of the United States.”⁸⁸ As a result, all Iranian nonimmigrant postsecondary students were ordered to report to the nearest Immigration and Naturalization Service office for identification and examination of status.⁸⁹ Mandatory registration allowed the government to “identify any Iranian students in the United States who are not in compliance with the terms of their entry visas, and to take the necessary steps to commence deportation proceedings against those who have violated applicable immigration laws and regulations.”⁹⁰

The special registration program required all nonimmigrant natives or citizens of Iran enrolled as post-secondary school students to report to a local immigration office or campus representative to “provide information as to residence and maintenance of

86. See Mark A. Sheft, *The End of the Smith Act Era: A Legal and Historical Analysis of Scales v. United States*, 36 AM. J. LEGAL HIST. 164 (1992).

87. *Iran Hostage Crisis*, HISTORY, <http://www.history.com/topics/iran-hostage-crisis> (last visited Jan. 2, 2018).

88. Exec. Order No. 12170, 44 Fed. Reg. 65729 (Nov. 14, 1979). In the order, Jimmy Carter stated, “I, JIMMY CARTER, President of the United States, find that the situation in Iran constitutes an unusual and extraordinary threat to the national security, foreign policy and economy of the United States and hereby declare a national emergency to deal with that threat.” *Id.* The order was made pursuant to the authority of the International Emergency Economics Powers Act, 50 U.S.C. §§ 1701–1706 (2012), the National Emergencies Act, 50 U.S.C. §§ 1601–1641 (2012), and 3 U.S.C. § 301 (2012).

89. *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979) (quoting 8 C.F.R. § 214.5 (1979)).

90. American Federation of Labor and Congress of Industrial Organizations: Remarks at the 13th Constitutional Convention, 1979 WEEKLY COMP. PRES. DOC. 2121–22 (Nov. 15, 1979); see also *Narenji*, 617 F.2d. at 749 (quoting 44 Fed. Reg. 65,727).

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nonimmigrant status.⁹¹ A group of Iranian students filed suit alleging the special registration program violated their equal protection rights.⁹² Although four judges in the United States Court of Appeals for the District of Columbia Circuit acknowledged that U.S. law has a "deep aversion to selective law enforcement against a group solely on the basis of their country of origin," the plaintiffs' equal protection challenges failed.⁹³ The court noted that "[d]istinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive."⁹⁴

The heightened suspicion of Middle Easterners continued as the U.S. Immigration and Nationality Services developed a secret contingency plan to register, intern, and deport nonimmigrants from Libya, Iran, Syria, Lebanon, Tunisia, Algeria, Jordan, and Morocco.⁹⁵ Although the plan was never implemented, its existence was a harbinger of an expansive special registration program, the National Security Entry-Exit Registration System, implemented in 2002. NSEERS's precursor occurred during the first Gulf War when nationals of Iraq and Kuwait seeking entry into the United States were registered and fingerprinted, soon joined by those of Sudanese citizenship.⁹⁶ Citizens of Iran and Libya were then added in 1996.⁹⁷

Special registration programs based on national origin are statutorily authorized in 8 U.S.C. § 1303(a) of the Immigration and Nationality Act (INA). Specifically, the Attorney General is granted broad powers to prescribe regulations for "registration and

91. *Narenji*, 617 F.2d at 748.

92. *Id.* (finding that Iranian students equal protection rights were not violated since the registration requirement had a "rational basis").

93. *Id.*

94. *Id.*

95. *Legislation to Implement the Recommendations of the Commission on Wartime Relocation and Internment of Civilians: Hearing on H.R. 442 and H.R. 1631 Before the Subcomm. on Admin. Law and Gov't Relations of the H. Comm. on the Judiciary*, 100th Cong. 56-100 (1987) (statement of Norman Y. Mineta, U.S. Congressman, California), <https://babel.hathitrust.org/cgi/pt?id=pst.000013607456;view=1up;seq=1>.

96. Louise Cainkar, *Special Registration: A Fervor for Muslims*, 7 J. ISLAMIC L. & CULTURE 73 (2002).

97. Diana C. Bauerle, *Special Registration: Past & Present, Consequences & Remedies*, 8 PUB. INT. L. REP., Spring 2003, at 1, 2.

fingerprinting" of certain classes of aliens.⁹⁸ This includes "aliens of any other class not lawfully admitted to the United States for permanent residence."⁹⁹ As a result, special registration programs before the 9/11 attacks set the precedent for the de facto Muslim nonimmigrant registry known as NSEERS.¹⁰⁰

The legality of a prospective Muslim registry, thus, depends in large part on the avenue through which the registration process is implemented. Immigration regulations or an executive order issued by the President, as opposed to legislation, historically have been the most common methods for imposing special registration of foreign nationals.¹⁰¹ As a result, congressional opposition can be overcome through executive fiat.¹⁰² For example, NSEERS granted the Executive authority to target nationals of twenty-four Muslim majority countries plus North Korea and Cuba.¹⁰³ Nationality served as a proxy for religion to avoid actionable claims alleging violations of the Establishment Clause of the First Amendment and equal protection under the Fifth Amendment.¹⁰⁴ I now turn to the

98. Immigration and Nationality Act, 8 U.S.C. § 1303(a) (2012).

99. *Id.* See *Narenji*, 617 F.2d at 747 (finding that 8 U.S.C. § 1303(a) allows the Attorney General to draw immigration distinctions based on nationality).

100. See *Kandamar v. Gonzales*, 464 F.3d 65, 73 (1st Cir. 2006) (noting that 8 U.S.C. §§ 1305 and 1303(a) "give[] the Attorney General great latitude in setting special registration requirements").

101. See DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 5–7, 85–86 (2003) (arguing that the government's post-9/11 national security policies have targeted Arab and Muslim noncitizens in the U.S.); Erica Newland, *Executive Orders in Court*, 124 YALE L.J. 2026 (2015). Notably, an executive order is faster because it is not subject to the notice and comment period applicable to executive agency regulations. However, an executive order can just as quickly be repealed by the next president whereas regulations require more legal process to rescind. KENNETH R. MAYER, *WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER* 179 (2001).

102. See Cam Simpson, Flynn McRoberts & Liz Sly, *Immigration Crackdown Shatters Muslims' Lives*, CHI. TRIBUNE (Nov. 16, 2003) (noting opposition to NSEERS by some Congressional officials), <http://www.chicagotribune.com/news/watchdog/chi-0311160374nov16-story.html>; *Senators and Congressman Demand Ashcroft Suspend INS Special Registration*, ADC (Dec. 26, 2002), <http://www.adc.org/2002/12/senators-and-congressman-demand-ashcroft-suspend-ins-special-registration/>.

103. See Kaveh Waddell, *America Already Had a Muslim Registry*, ATLANTIC (Dec. 20, 2016) (stating that NSEERS was a special registration program of people from Muslim-majority countries), <https://www.theatlantic.com/technology/archive/2016/12/america-already-had-a-muslim-registry/511214/>.

104. See *Lemon v. Kurtzman*, 403 U.S. 602, 602 (1971) (establishing a three-part test

regulatory scheme undergirding NSEERS, which the government will likely point to as a model for future national origin based special registration programs.

III. THE NATIONAL SECURITY ENTRY-EXIST SYSTEM (NSEERS) FOR NONIMMIGRANTS

Less than a year after the 9/11 terrorist attacks, the Bush administration established the National Security Entry-Exit System (NSEERS).¹⁰⁵ On August 12, 2002, the Department of Justice (DOJ) issued a press release stating the purpose of NSEERS was to “enable mass tracking of individual entries, departures, and domestic whereabouts.”¹⁰⁶ The program initiated mass fingerprinting for “higher-risk visiting aliens” at ports of entry, using “intelligence criteria reflecting patterns of terrorist organizations’ activities.”¹⁰⁷ These purportedly high-risk individuals—nearly all of whom were nationals of Muslim majority countries—would be required to “periodically confirm where they are living and what they are doing in the United States.”¹⁰⁸ The individuals must also confirm their exit from the United States.¹⁰⁹ Rejecting claims that NSEERS was

wherein the law at issue: 1) must have a primary secular purpose; 2) may not have the principal effect of advancing or inhibiting religion; and 3) may not foster excessive entanglement with religion); *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886) (holding that unequal application of a San Francisco city ordinance that disproportionately affected Chinese laundry owners constituted a denial of 14th Amendment equal protection to aliens in the U.S.); Michael Price & Faiza Patel, *Muslim Registry or NSEERS Reboot Would be Unconstitutional*, BRENNAN CTR. FOR JUST. (Nov. 22, 2016), <http://www.brennancenter.org/blog/muslim-registry-or-nseers-reboot-would-be-unconstitutional>. In *Yick Wo*, the Court explained that “[t]he rights of the petitioners . . . are not less because they are aliens and subjects of the emperor of China. . . . The fourteenth amendment to the constitution is not confined to the protection of citizens.” *Yick Wo*, 118 U.S. at 368–69.

105. See Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52584 (Aug. 12, 2002) (to be codified at 8 C.F.R. pts. 214, 264) (instituting “special registration” for entering and departing nonimmigrants, also known as National Security Entry-Exit Registration System (“NSEERS”)).

106. Kareem Shora, *National Security Entry Exit Registration System (NSEERS)*, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 73, 75 (2003).

107. *Attorney General Ashcroft Announces Implementation of the First Phase of the National Security Entry-Exit Registration System*, DEP’T OF JUST. (Aug. 12, 2002), https://www.justice.gov/archive/opa/pr/2002/August/02_ag_466.htm.

108. *Id.*

109. *Id.*

discriminatory, the DOJ noted “[t]his practice of requiring foreign visitors to periodically register with law enforcement authorities has long been commonplace in European countries.”¹¹⁰

But it was no secret that NSEERS was a de facto Muslim registry.¹¹¹ Legally grounded in the Executive’s broad powers in immigration law pursuant to the plenary power doctrine,¹¹² NSEERS required all nonimmigrant males over the age of sixteen from the twenty-four Muslim majority countries, Cuba, and North Korea to register with the U.S. government.¹¹³ Only persons whose legal presence was temporary—such as persons with student, work, and visitor visas—were subject to special registration while persons with

110. *Id.*

111. Cam Simpson, Flynn McRoberts & Liz Sly, *supra* note 103 (noting opposition to NSEERS by some Congressional officials).

112. See 8 U.S.C. § 1103(a)(1) (2012) (charging the Secretary of Homeland Security with enforcement of federal immigration law); *Mathews v. Diaz*, 426 U.S. 67, 67 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 765–66, 766 n.6 (1972); *Chae Chan Ping v. United States*, 130 U.S. 581, 581 (1889); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (1984) (coining the term “plenary power doctrine,” refuting the various legal theories offered in support of the doctrine, arguing that the Court should abandon the special deference accorded Congress in immigration cases, and identifying ways in which the lower courts have circumvented the doctrine); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990); Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 SUP. CT. REV. 1 (1999). Although the debate on “immigration exceptionalism,” wherein scholars debate the demise of the plenary doctrine, is certainly relevant to the legality of a prospective Muslim registry of noncitizens, these broader jurisprudential questions are beyond the scope of this Article. See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (stating that deportation may not be based upon an unjustifiable standard such as race or religion); Kevin R. Johnson, *Immigration and the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 68 OKL. L. REV. 57 (2015); Michael Kagan, *Plenary Power Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21 (2015).

113. Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52584, 52589 (Aug. 12, 2002) (to be codified at 8 C.F.R. pts. 214, 264); Registration and Monitoring of Certain Nonimmigrants from Designated Countries, 67 Fed. Reg. 57032 (Sept. 6, 2002); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 67766 (Nov. 6, 2002); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 70525 (Nov. 22, 2002); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 77641 (Dec. 18, 2002); Registration of Certain Nonimmigrant Aliens from Designated Countries, 68 Fed. Reg. 2363 (Jan. 16, 2003).

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lawful permanent residence and U.S. citizenship were exempt.¹¹⁴ As a result, more than 80,000 people were registered under NSEERS.

Eligible foreign nationals had to register at ports of entry and follow up with an in-person interview.¹¹⁵ Those already in the country had to register with the U.S. Department of Homeland Security.¹¹⁶ Individuals who failed to register risked being placed in removal proceedings for failure to appear, a consequence that continues to harm individuals long after NSEERS ended.¹¹⁷

NSEERS utilized intrusive registration, interviewing, and identification processes to track targeted individuals.¹¹⁸ Within thirty to forty days of arrival in the United States, the individual had to report to an immigration office.¹¹⁹ He was also required to update every change of address with the immigration authorities, and return to the immigration office again if his presence extended longer than a year.¹²⁰ Each visit was an opportunity for the government to chill religious and political behavior through questions about mosque attendance, opinions about American foreign policy, and stances on current events in the Middle East.¹²¹ Upon leaving the country, registrants had to report to an immigration inspecting officer at the port of exit.¹²²

114. 8 U.S.C. § 1101(a)(15) (2012) (“The term ‘immigrant’ means every alien except an alien who is within one of the following classes of nonimmigrant aliens.”); *id.* § 1101(a)(15)(A)–(V) (stating nonimmigrant aliens include: foreign government officials, visitors for business and pleasure, aliens in transit through the United States, treaty traders and investors, students, international representatives, temporary workers and trainees, representatives of foreign information media, exchange visitors, fiancé(e)s of U.S. citizens, intracompany transferees, NATO officials, and religious workers).

115. Lohmeyer, *supra* note 22, at 140.

116. *See id.*; Shoba Sivaprasad Wadhia, *Business as Usual: Immigration and the National Security Exception*, 114 PENN ST. L. REV. 1485, 1502 (2010).

117. *See* RIGHTS WORKING GROUP & PENN STATE LAW, *THE NSEERS EFFECT: A DECADE OF RACIAL PROFILING, FEAR, AND SECRECY* (2012), https://pennstatelaw.psu.edu/_file/clinics/NSEERS_report.pdf.

118. *See* Kareem Shora, *National Security Entry Exit Registration System (NSEERS)*, CARDOZO PUB. L. POL’Y & ETHICS J. 73, 75 (2003).

119. *See id.* at 76.

120. *See id.*

121. Wadhia, *supra* note 116, at 1502.

122. Shora, *supra* note 118, at 76.

When immigration officials could not handle the thousands of people attempting to register in person, the Department of Homeland Security (DHS) created a “call-in” component.¹²³ Government officials conducted call-in interviews to obtain information about bank accounts, credit cards, and political, religious or social group affiliations.¹²⁴ Despite registering tens of thousands of people, the Attorney General acknowledged that, as of 2003, NSEERS led to the capture of only eleven individuals with ties to a terrorism organization.¹²⁵ The DOJ never disclosed any additional information regarding the captured individuals, and did not indicate whether the individuals were detained while in the country or at a port of entry.¹²⁶

A. Statutory Authorization of NSEERS

Although NSEERS proved ineffective in capturing suspected terrorists, it quite effectively expelled thousands of Muslims from the U.S. More than 13,000 men were placed into removal proceedings after reporting in person to immigration offices.¹²⁷ The men were removed for immigration visa violations, not terrorism-related charges.¹²⁸ One report stated that immigration officials in Southern California detained between five hundred and seven hundred Muslim men, who voluntarily registered, based on suspected visa violations.¹²⁹ The derivative consequences of NSEERS still adversely affect noncitizens from the twenty four Muslim majority countries.¹³⁰ For many, noncompliance with NSEERS has resulted in a denial of immigration relief or benefits and led to removal proceedings years

123. See Wadhia, *supra* note 116, at 1502; Louis Cainkar, *Targeting Muslims, at Ashcroft's Discretion*, MIDDLE EAST RESEARCH AND INFORMATION PROJECT (Mar. 14, 2003), <http://www.merip.org/mero/mero031403>.

124. Wadhia, *supra* note 116, at 1502.

125. See Shora, *supra* note 118, at 74.

126. *Id.*

127. Shoba Sivaprasad Wadhia, *Is Immigration Law National Security Law?*, 66 EMORY L.J. 669, 692 (2017).

128. *Id.*

129. See *Mass Arrests of Muslims in LA*, BBC NEWS (Dec. 19, 2002, 11:37 GMT), <http://news.bbc.co.uk/2/hi/americas/2589317.stm> (“US immigration officials in Southern California have detained hundreds of Iranians and other Muslim men.”).

130. Wadhia, *supra* note 116, at 1507.

after NSEERS ended.¹³¹

In 2011, the Bush administration delisted all twenty-six countries thereby ceasing enforcement of NSEERS. In 2016, just before leaving office, Obama repealed NSEERS.¹³² However, the program's regulatory structure remains intact, causing concerns that Trump may reinstate it.¹³³ That multiple failed constitutional challenges to NSEERS warrants a closer look at national origin based registration programs.¹³⁴

Although NSEERS limited registration to nonimmigrants, its legal structure offers a potential model on which the government may propose a de facto Muslim registry for both nonimmigrants and immigrants. Statutory authorization for the NSEERS is found within the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA).¹³⁵ Section 110 of the IIRAIRA states: "The Attorney General shall implement and integrate entry and exit data system."¹³⁶ This section was later amended in 2000 to clarify that the system documenting entries and exits is not meant to be construed "to permit the United States government to impose any new documentary or data collection requirements. . . ."¹³⁷

131. *Id.* at 1508.

132. *See* Removal of Regulations Relating to Special Registration Process for Certain Nonimmigrants, 81 Fed. Reg. 94,231 (Dec. 23, 2016) (to be codified at 8 C.F.R. pts. 214, 264) (describing the repealed NSEERS regulations); *see also* Kevin Liptak & Shachar Peled, *Obama Administration Ending Program Once Used to Track Mostly Arab and Muslim Men*, CNN (Dec. 22, 2016, 12:34 PM), <http://www.cnn.com/2016/12/22/politics/obama-nseers-arab-muslim-registry/> (stating that Obama would end NSEERS after the program had been suspended since 2011).

133. Waddell, *supra* note 103, at 3; *see also* J. David Goodman & Ron Nixon, *Obama to Dismantle Visitor Registry Before Trump Can Revive It*, N.Y. TIMES (Dec. 22, 2016), <https://nyti.ms/2hdfReq>.

134. *See* Ahmed v. Gonzales, 447 F.3d 433, 439–40 (5th Cir. 2006); Ali v. Gonzales, 440 F.3d 678, 681 n.4 (5th Cir. 2006); Zafar v. U.S. Att'y Gen., 461 F.3d 1357, 1367 (11th Cir. 2006); Roudnahal v. Ridge, 310 F. Supp. 2d 884, 892 (N.D. Ohio 2003).

135. PENN. STATE UNIV. DICKINSON SCH. OF LAW CTR. FOR IMMIGRANTS' RIGHTS, NSEERS: THE CONSEQUENCES OF AMERICA'S EFFORTS TO SECURE ITS BORDERS 12 (2009), <http://www.adc.org/fileadmin/ADC/Pdfs/nseerspaper.pdf>.

136. *Id.*; *see also* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.).

137. PENN. STATE UNIV. DICKINSON SCH. OF LAW CTR. FOR IMMIGRANTS' RIGHTS, *supra* note 135, at 12.

Further authorization exists pursuant to the Immigration and Nationality Act. Section 263 of the INA allows for the registration of several nonimmigrant groups at the discretion and requirement of the Attorney General.¹³⁸ The provision states: “[T]he Attorney General is authorized to prescribe special regulations and forms for the registration and fingerprinting of . . . aliens of any other class not lawfully admitted to the United States for permanent residence.”¹³⁹ The provision also allows for the registration of alien crewmen, holders of border-crossing identification cards, aliens confined in institutions, and aliens on criminal parole or probation.¹⁴⁰ However, none of the classifications specifically permits selective registration based on country of origin or religion.¹⁴¹

Following the 9/11 terrorists attacks, the government revisited the entry-exit data collection system.¹⁴² The USA PATRIOT Act required the development of a system focused on entry and exit in order to provide greater protection for the United States and to help aliens fulfill their responsibilities under the laws of the United States.¹⁴³ The Act stated it is the sense of Congress to enact a program for the registration and documentation of entries and exits at “airports, seaports, and land border ports of entry”¹⁴⁴ In 2002, Congress mandated such an entry and exit system, delegating the responsibility to the Department of Justice.¹⁴⁵ NSEERS was among the first programs initiated under this mandate.

B. Equal Protection Challenges to NSEERS

Civil liberties advocates opposed to NSEERS for unfairly targeting Arabs and Muslims filed lawsuits challenging the program on equal

138. *Id.* at 14; *see also* Immigration and Nationality Act, 8 U.S.C. § 1303 (2012).

139. 8 U.S.C. § 1303.

140. *Id.*

141. PENN. STATE UNIV. DICKINSON SCH. OF LAW CTR. FOR IMMIGRANTS’ RIGHTS, *supra* note 135, at 12.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 13.

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protection grounds.¹⁴⁶ A threshold issue was whether courts should review the government's actions based on the strict scrutiny test reserved for invidious criteria, or the rational basis test that effectively rubber-stamps executive action.¹⁴⁷ Under a rational basis analysis, so long as the government's actions are rationally related to a "legitimate" government interest, then the law at issue is constitutional.¹⁴⁸ That is, a classification is permissible "if there is any reasonably conceivable state of facts that could provide a rational basis."¹⁴⁹ In cases where the rational basis test applies, legal challenges to government action frequently fail.¹⁵⁰ In the NSEERS cases, the courts applied rational basis, and as a result, none of the lawsuits were successful.¹⁵¹

146. *Id.* at 22–27; see Rachel L. Swarns, *Special Registration for Arab Immigrants Will Reportedly Stop*, N.Y. TIMES (Nov. 22, 2003), <http://www.nytimes.com/2003/11/22/us/special-registration-for-arab-immigrants-will-reportedly-stop.html>.

147. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985) (noting that under a rational basis review, the court must determine whether a classification is "rationally related to a legitimate governmental purpose").

148. See *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *Nebbia v. New York*, 291 U.S. 502 (1934).

149. *Heller v. Doe*, 509 U.S. 312, 319–20 (1993) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)).

150. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

151. *Id.* All the courts of appeals that considered the constitutional validity of the NSEERS held that special registration of aliens based on nationality did not violate the Equal Protection Clause. See *Rajah v. Mukasey*, 544 F.3d 427, 435 (2d Cir. 2008) ("[C]lassifications on the basis of nationality are frequently unavoidable in immigration matters. . . . [S]uch classifications [are] commonplace and almost inevitable. Indeed, the very concept of 'alien' is a nationality-based classification."); *Malik v. Gonzales*, 213 Fed. App'x. 173 (4th Cir. 2007) (explaining that courts have no jurisdiction to review equal protection challenges in immigration cases); *Zerrei v. Gonzales*, 471 F.3d 342, 347–48 (2d Cir. 2006) (rejecting the claim that the NSEERS violates the Equal Protection Clause); *Zafar v. U.S. Att'y Gen.*, 461 F.3d 1357, 1367 (11th Cir. 2006) ("Petitioners' equal protection rights were not violated by being required to be registered in the national Security Entry-Exit Registration System."); *Sewani v. Gonzales*, 162 Fed. App'x. 285, 287 (5th Cir. 2006) ("Due process does not require Congress to grant aliens from all nations with the same chances for admission to or remaining with the United States. Congress may permissibly set immigration criteria that are sensitive to an alien's nationality or place of origin." (quoting *Rodriguez-Silva v. INS*, 242 F.3d 243, 248 (5th Cir. 2001))); *Shaybob v. U.S. Att'y Gen.*, 189 Fed. App'x. 127, 129–30 (3d Cir. 2006) ("The Call-In Program does not violate the Equal Protection guarantee of the Fifth Amendment. . . . [T]he power to exclude or expel particular classes of aliens is historically within the province of the political branches."); *Ali v. Gonzalez*, 440 F.3d 678, 682 n.4 (5th Cir. 2006) ("[N]ationality classification has been repeatedly upheld by this Court and others against constitutional attack.").

For example, the First Circuit in *Kandamar v. Gonzales*¹⁵² held that NSEERS did not violate petitioner's equal protection rights. Abdelaziz Kandamar, a native of Morocco, voluntarily complied with NSEERS during which the government discovered he was out of status. He was subsequently arrested and issued a notice of removal. Kandamar challenged his deportation on constitutional grounds "that NSEERS constitutes racial profiling and discrimination based on national origin; violates substantive due process because its use 'to entrap nationals of certain countries' is fundamentally unfair; and violates equal protection by treating legal and illegal entrants differently."¹⁵³ At the outset, the First Circuit highlighted Supreme Court jurisprudence holding that "judicial review of line-drawing in the immigration context is deferential."¹⁵⁴ The court noted that an alien's nationality and place of origin are permissible criteria for enforcing immigration law, pointing out that INA section 263 allows for the registration of "any other class not lawfully admitted to the United States for permanent residence."¹⁵⁵ In rejecting Kandamar's constitutional claims, the court applied the rational basis test to hold that NSEERS served a legitimate government objective of "monitoring nationals from certain countries to prevent terrorism and is rationally related to achieving these monitoring objectives."¹⁵⁶

The Second Circuit in *Rajah v. Mukasey* also upheld NSEERS as constitutional.¹⁵⁷ Plaintiffs were nonimmigrant male foreign nationals from the designated Muslim majority countries and included non-Muslim nationals from designated countries. Upon complying with registration requirements, Plaintiffs were subject to deportation orders based on alleged violations of immigration law. Among other claims, plaintiffs filed an equal protection claim alleging NSEERS was motivated by unlawful religious animus.¹⁵⁸ In rejecting the claims, the court found the program was motivated by bona fide and legitimate

152. *Kandamar v. Gonzales*, 464 F.3d 65 (1st Cir. 2006).

153. *Id.* at 68.

154. *Id.* at 72.

155. *Id.* at 73 (quoting 8 U.S.C. § 1303(a) (2012)).

156. *Id.*

157. *Rajah v. Mukasey*, 544 F.3d 427, 435 (2d Cir. 2008).

158. *Id.* at 438; *see Roudnahal v. Ridge*, 310 F. Supp. 2d 884, 892 (N.D. Ohio 2003).

national security reasons.

That NSEERS was an immigration program purportedly motivated by national security made constitutional claims more difficult to win. Immigration law is an area over which the Executive and Congress exercise plenary power.¹⁵⁹ In addition, courts frequently find national security to be a compelling state interest that supersedes equal protection concerns in classifications based on alienage or national origin.¹⁶⁰ Citing a line of post-9/11 cases dismissing equal protection claims arising from the detention and abuse of nonimmigrant Muslims, the government may argue the registrants' religious traits are merely incidental to the neutral national security purpose of a special registration program.¹⁶¹ As such, challengers of a Muslim registry targeting nonimmigrants will face a tall order in persuading courts to break with the tradition of judicial deference pursuant to the plenary power doctrine.

Notwithstanding the government's argument that it need only provide a "facially legitimate and bona fide" reason for an immigration decision such that a court may not inquire into evidence of an unlawful motive, the courts are becoming increasingly suspicious of national security as a smokescreen for unconstitutional executive action.¹⁶² The Ninth Circuit and Fourth Circuit decisions blocking Trump's travel bans suggest that courts may be willing to hold the Executive accountable for sweeping programs affecting the rights of tens of millions of people.¹⁶³ That the U.S. Supreme Court upheld the

159. Lohmeyer, *supra* note 22, at 159. See generally Karla Mari McKanders, *Federal Preemption and Immigrant's Rights*, 3 Wake Forest J. L. & Pol'y 333, 340-44 (2013) (discussing the "Plenary Powers Doctrine").

160. See Haig v. Agee, 453 U.S. 280, 307 (1981) ("It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation."); see also Zerrei v. Gonzales, 471 F.3d 342, 344 (2nd Cir. 2006); Zafar v. U.S. Attorney Gen., 461 F.3d 1357 (11th Cir. 2006).

161. Ashcroft v. Iqbal, 556 U.S. 662 (2009); see Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002) (noting that the need to establish a discriminatory intent would make it difficult to prevail on an Equal Protection claim); Akram & Karmely, *supra* note 8.

162. See, e.g., Kleindienst v. Mandel, 408 U.S. 753, 769 (1972).

163. See *Hawai'i v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017); Martin H. Redish, *Trump is Not Above the Courts*, N. Y. TIMES (Mar. 16, 2017), https://www.nytimes.com/2017/03/16/opinion/trump-is-not-above-the-courts.html?_r=0.

temporary restraining orders of the Muslim bans as they pertain to any entrant without a “bona fide relationship” in the United States is further indicia that the plenary power is not limitless.¹⁶⁴

For two reasons, the courts are unlikely to grant the same judicial deference as they did for NSEERS should Trump seek to reinstate a program similar to NSEERS. First, the Muslim ban cases demonstrate there is ample evidence to support allegations that a special registration of people from Muslim majority countries would be driven by religious animus.¹⁶⁵ Second, in contrast to the years following 9/11 when there was no automated entry-exit database for all foreigners, Trump cannot point to a non-discriminatory need for a special registration program based on national origin.

Currently, the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) tracks all foreign visitors who enter and exit the United States thereby allowing the government to identify persons who may be engaged in terrorism or other illegal activity.¹⁶⁶ The implementation of US-VISIT coupled with persistent criticism of NSEERS as discriminatory, prompted DHS to remove all designated countries from NSEERS.¹⁶⁷ Weeks before Trump’s inauguration, President Obama repealed the regulations authorizing NSEERS after civil rights advocates pointed out that special registration could easily be reinstated merely by adding countries to the list.¹⁶⁸

Ultimately, the fate of a prospective de facto Muslim registry depends on what judicial standard of constitutional review applies.¹⁶⁹

164. *Trump v. Int’l Refugee Assistance Project (IRAP)*, 137 S. Ct. 2080 (2017); *Zadvydas v. Davis*, 533 U.S. 678 (2001).

165. *See supra* notes 27–28 (travel ban cases).

166. *See* DEP’T OF HOMELAND SEC., *US-VISIT: KEEPING AMERICA’S DOORS OPEN AND OUR NATION SECURE* (2007), https://www.dhs.gov/xlibrary/assets/usvisit/usvisit_edu_traveler_brochure_english.pdf.

167. *DHS Removes Designated Countries from NSEERS Registration (May 2011)*, DEP’T OF HOMELAND SEC (Sept. 29, 2015), <https://www.dhs.gov/dhs-removes-designated-countries-nseers-registration-may-2011>.

168. Nadeem Muaddi, *Obama Urged to Dismantle NSEERS Visa Tracking Program*, CNN (Nov. 23, 2016, 2:05 AM), <http://www.cnn.com/2016/11/22/politics/obama-nseers-visa-tracking-program/>.

169. *See* YAMAMOTO ET AL., *supra* note 18, at 103.

If the courts treat special registration as an immigration matter, then the rational basis test applies pursuant to the plenary power doctrine. Similarly, if the courts accept the government's national security justifications, courts are likely to apply the rational basis test to an equal protection challenge. This outcome nearly guarantees judicial approval of executive action. Should a court determine the Muslim registry targets persons based on their alienage without serving an immigration purpose, then the strict scrutiny test applies.¹⁷⁰

A de jure Muslim registry implemented by the Trump administration, however, may not even pass the rational basis test due to the lack of a plausible national security reason for singling out Muslims. Terrorist attacks in the United States are conducted by people of various faiths, or no faith at all, and the majority are not Muslim.¹⁷¹ There is no scientific evidence showing that a person's religion, much less Islamic beliefs, is a causal factor in domestic terrorism.¹⁷² Moreover, international terrorist groups are savvy at finding persons who do not fit a racial or religious profile as a means of averting state detection. John Walker Lindh, Adam Yahiyeh Gadahn, Jose Padilla, Bryant Neal Vinas, and Colleen LaRose are some examples of Americans convicted of terrorism whose ancestors are not from Muslim majority countries.¹⁷³ Absent credible factual support

170. See *Graham v. Richardson*, 403 U.S. 365, 375–76 (1971); see also *Nyquist v. Mauclet*, 432 U.S. 1, 11–12 (1977); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 413, 420, 422 (1948) (holding unconstitutional a California statute that targeted individuals of Japanese descent by barring issuance of fishing licenses to persons “ineligible to citizenship” and explaining that “the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits”); Fatma Marouf, *Alienage Classifications and the Denial of Health Care to Dreamers*, 93 WASH. U. L. REV. 1271, 1289 (2016) (noting that “there is currently a circuit split about whether strict scrutiny is limited to legal permanent residents (“LPRs”) or extends to others who are lawfully present”).

171. See generally Washington's Blog, *Non-Muslims Carried Out More than 90% of All Terrorist Attacks in America*, GLOBAL RESEARCH (Jan. 28, 2017), <https://www.globalresearch.ca/non-muslims-carried-out-more-than-90-of-all-terrorist-attacks-in-america/5333619> (citing multiple academic and policy reports finding that most terrorist acts in the U.S. are committed by non-Muslims).

172. Tim Krieger & Daniel Meierrieks, *What Causes Terrorism?* 147 PUB. CHOICE 3, 12 (2011) (citing empirical studies finding no significant linkages between religious factors and terrorism).

173. Susan Candiotti, *Walker Lindh Sentenced to 20 years*, CNN (Oct. 4, 2002, 11:44 PM), <http://www.cnn.com/2002/LAW/10/04/lindh.statement/>; Adam Yahiyeh Gadahn, *\$1 Million for Arrest of American Al Qaeda Charged with Treason*, CNN (Oct. 12, 2006, 10:35

that the deprivation of rights is related to an “immediate, imminent, and impending” public danger, a de jure Muslim registry is unlikely to pass constitutional muster.¹⁷⁴

Finally, the courts’ granting of preliminary injunctions for Trump’s travel bans being unlawfully motivated by religious animus does not bode well for a prospective de facto Muslim registry.¹⁷⁵ Much will depend on whether judges will include Trump’s anti-Muslim statements and tweets in their determination of the primary purpose of a Muslim registry. Hence, a look at the travel ban cases is instructive.

IV. TRUMP’S “MUSLIM BAN” AS PROLOGUE FOR A MUSLIM REGISTRY

On January 29, 2017, President Donald Trump signed an executive order indefinitely halting admission of Syrian refugees, suspending admissions of other refugees for 120 days, and barring entry of all nationals from seven Muslim majority countries for 90 days.¹⁷⁶ Citizens of Syria, Yemen, Iran, Iraq, Libya, Somalia, and Sudan were denied entry even if they were students, workers, or lawful permanent residents who had lawfully lived in the United States for

AM), <http://www.cnn.com/2006/LAW/10/11/gadah/index.html?s=PM:LAW;com/wp-dyn/content/article/2007/08/16/AR2007081601009.html>; Tom Hays, *Al-Qaida Member Who Flipped and Helped U.S. Gets Time Served*, CHICAGO TRIBUNE (May 11, 2017, 3:16 PM), <http://www.chicagotribune.com/news/nationworld/ct-al-qaida-new-york-sentencing-bryant-vinas-20170511-story.html>; John Shiffman, *U.S. woman known as Jibad Jane Sentenced to 10 years in Plot*, REUTERS (Jan. 6, 2014, 9:54 AM), <http://www.reuters.com/article/us-usa-jihadjane-idUSBREA050PC20140106>; Peter Whoriskey, *Jury Convicts Jose Padilla of Terror Charges*, WASH. POST (Aug. 17, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/16/AR2007081601009.html>. As of 2016, 123 people have been killed by terrorism perpetrated by Muslims in the U.S. Charles Kurzman, *Muslim-American Involvement with Violent Extremism in 2016*, TRIANGLE CTR. ON TERRORISM & HOMELAND SEC. (Jan 26, 2017), https://sites.duke.edu/tcths/files/2017/01/FINAL_Kurzman_Muslim-American_Involvement_in_Violent_Extremism_2016.pdf.

174. See *Korematsu v. U.S.*, 323 U.S. 214 (1944) (Murphy, J., dissenting).

175. See, e.g., *Int’l Refugee Assistance Project (IRAP) v. Trump*, 857 F. 3d 554 (4th Cir.), *vacated*, No. 16-1436, 2017 WL 4518553 (U.S. Oct. 10, 2017); *Hawaii v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017); see also Sorkin, *supra* note 53.

176. Stack, *supra* note 64; see also *Full Executive Order Text: Trump’s Action Limiting Refugees into the U.S.*, N.Y. TIMES (Jan. 27, 2017), <https://www.nytimes.com/2017/01/27/us/politics/refugee-muslim-executive-order-trump.html> [Hereinafter *Executive Order Text*].

years.¹⁷⁷ Not since the Reagan administration barred Iranians from entering the United States after the Iranian hostage crisis had a President invoked section 1182(f) to ban all citizens from an entire country.¹⁷⁸

The Trump administration maintained that the purpose of the ban was to combat terrorism, and more specifically, to address the alleged growing threat of foreign fighters entering the United States.¹⁷⁹ It claimed its program was merely an expansion of the Visa Waiver Program Improvement and Travel Prevention Act of 2015 that excluded from the Visa Waiver Program nationals of or people who have recently visited Iraq, Syria, Iran, or any other country designated as a state sponsor of terrorism by the State Department.¹⁸⁰ In 2016, visitors to or dual citizens of Libya, Somalia, and Yemen were also excluded from the Visa Waiver Program¹⁸¹

177. See *Executive Order Text*, *supra* note 176.

178. *Yassini v. Crosland*, 618 F.2d 1356, 1361 (9th Cir. 1980); Int'l Refugee Assistance Project (*IRAP*) v. Trump, 241 F. Supp. 3d 539 (D. Md.), *aff'd in part, vacated in part*, 857 F.3d 554 (4th Cir. 2017).

179. See Blake Hounshell, *President Trump's First Defeat*, POLITICO (Jan. 29, 2017), <http://www.politico.com/magazine/story/2017/01/president-trumps-first-defeat-214707> (noting that although the ban was aimed at stopping terrorism, it did not exclude the home countries of the 9/11 hijackers). Trump has signed several executive orders involving immigration. See Rebecca Harrington, *Trump Signed 90 Executive Actions in His First 100 Days—Here's What Each One Does*, BUSINESS INSIDER (May 3, 2017, 11:07 AM), <http://www.businessinsider.com/trump-executive-orders-memorandum-proclamations-presidential-action-guide-2017-1/#executive-order-january-25-cutting-funding-for-sanctuary-cities-32> (noting that Trump effectuated an immigration ban, ordered the building of a border wall with Mexico, and cut funding for sanctuary cities). *But see Darweesh Case Amici Brief*, *supra* note 41, at 5 (arguing there is no national security threat justifying this broad travel ban); Berenice Boutine et al., *The Foreign Fighters Phenomenon in the European Union*, ICCT (April 2016), https://www.icct.nl/wp-content/uploads/2016/03/ICCT-Report-Foreign-Fighters-Phenomenon-in-the-EU_1-April-2016_including-AnnexesLinks.pdf.

180. Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, 8 U.S.C. 1187 (Supp. III 2012); *DHS Announces Further Travel Restriction for the Visa Waiver Program*, DEP'T OF HOMELAND SEC. (Feb. 18, 2016), <https://www.dhs.gov/news/2016/02/1/dhs-announces-furthertravel-restrictions-visa-waiver-program> (excluding dual nationals of or have recently visited Iraq, Syria, or any country designated by the Secretary of State as a state sponsor of terrorism). The Visa Waiver Program allows nationals of certain countries to seek temporary admission into the United States for 90 days or less. 8 U.S.C. § 1187(a)(12).

181. *DHS Announces Further Travel Restriction for the Visa Waiver Program*, DEP'T OF HOMELAND SEC. (Feb. 18, 2016), <https://www.dhs.gov/news/2016/02/1/dhs-announces-furthertravel-restrictions-visa-waiver-program>.

Trump's executive order continued the post-9/11 legacy wherein the liberty, livelihoods, and dignity of Muslims were subordinated by racialized counterterrorism practices. Even though few confirmed terrorists are nationals of the seven selected countries, all of their citizens were penalized as a result of stereotypes of Muslims as inherently prone to terrorism and violent anti-Americanism.¹⁸² Indeed, an affidavit signed by ten former national security, foreign policy, and intelligence officers in democratic and republican administrations stated that as of January 19, 2017 (when Donald Trump was inaugurated as President) "there is no national security purpose" for a total bar of entry for aliens from the designated countries, an unprecedented and sweeping exclusion of a broad class of people.¹⁸³ Tellingly, similar stereotypes of persons of Japanese ancestry as collectively disloyal, and thus predisposed to espionage, buttressed the internment and curfew cases in the 1940s.¹⁸⁴

The explicit association of Muslims with terrorism, coupled with political opposition to Trump's presidency, triggered protests across the country at over forty airports and state capitals. Lawyers immediately filed lawsuits in multiple states seeking to block enforcement of the executive order.¹⁸⁵ The complaints alleged

182. Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1581 (2002); Alex Nowrasteh, *Where Do Terrorists Come from? Not the Nations Named in Trump Ban*, NEWSWEEK (Jan. 31, 2017, 8:40 AM), <http://bit.ly/2kWoDdx>; see Aziz, *supra* note 84, at 194 (noting that opponents of Muslim accommodation dismiss religious freedom by shifting the debate to Islam's pathological violence); Aziz, *supra* note 29, at 430 (stating that the government sent the message to millions through the media that "Muslims and Arabs [were] inherently violent and intent on destroying the American way of life."). See generally Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1692 (2000) (demonstrating how racial and cultural profiling changes the political outcome of an individual's case).

183. Corrected Brief of Former National Security Officials as Amici Curiae in Support of Plaintiff-Appellees and Against a Stay Pending Appeal, *IRAP*, 857 F.3d 554 (No. 17-1351). See also Brief of Amici Curiae Former National Security Officials in Opposition to the Applications for a Stay, *Trump v. Int'l Refugee Assistance Project (IRAP)*, 137 S. Ct. 2080 (2017) (Nos. 16-1436 (16A1190)).

184. See *Hirabayashi v. United States*, 320 U.S. 81, 96 (1943) ("There is support for the view that social, economic and political conditions which have prevailed since the close of the last century, when the Japanese began to come to this country in substantial numbers, have intensified their solidarity and have in large measure prevented their assimilation as an integral part of the white population."); YAMAMOTO ET AL., *supra* note 18, at 7.

185. See Andy Newman, *Highlights: Reaction to Trump's Travel Ban*, N.Y. TIMES (Jan. 29,

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the order was motivated by unlawful religious animus, thereby violating the Establishment Clause, equal protection rights, and the Immigration and Nationality Act.¹⁸⁶

Government lawyers argued the President's plenary power to enforce immigration law authorized the use of nationality to bar persons from entering the United States.¹⁸⁷ They pointed to 8 U.S.C. § 1182(f), which authorizes the President to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants" when allowing admission would be "detrimental to the interests of the United States."¹⁸⁸ Furthermore, Congress authorized the Executive

2017), <https://www.nytimes.com/2017/01/29/nyregion/trump-travel-ban-protests-briefing.html>. Over fifty lawsuits were filed across the country in response to Trump's executive orders. See Garrett Hinck et al., *Litigation Documents & Resources Related to Trump Executive Order on Immigration*, LAWFARE, <https://lawfareblog.com/litigation-documents-resources-related-trump-executive-order-immigration> (last visited Nov. 27, 2017), for documents in ongoing litigation related to the travel ban.

186. *Al Homssi v. Trump*, No. 1:17-CV-00801 (N.D. Ill. Feb. 2, 2017); *Abu Asali v. U.S. Dept. of Homeland Sec.*, No. 5:17-CV-00447 (E.D. Pa. Jan. 31, 2017); Complaint for Declaratory and Injunctive Relief, *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. signed Feb. 3, 2017); Complaint in Intervention for Declaratory and Injunctive Relief, *Aziz v. Trump*, 234 F. Supp. 3d 724 (No. 1:17-cv-116 (LMB/TCB)) (E.D. Va. Feb. 13, 2017); Complaint for Declaratory and Injunctive Relief, *Hawai'i v. Trump*, 245 F. Supp.3d 1227 (No. 17-00050 DKW-KSC) (D. Haw.), *aff'd in part, vacated in part*, 859 F.3d 741 (9th Cir. 2017); Complaint for Injunction and Repeal of Presidential Exec. Order Dated January 27, 2017 Suspending Visas and Immigration Benefits Without Congressional Approval, *People v. Trump*, No. 3:17-cv-451 (N.D. Cal. filed Jan. 28, 2017).

187. The amended executive order makes the following rationale for excluding all citizens from the six selected nations:

Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones. Any of these circumstances diminishes the foreign government's willingness or ability to share or validate important information about individuals seeking to travel to the United States. Moreover, the significant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States. Finally, once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of these countries typically delay issuing, or refuse to issue, travel documents.

Exec. Order No. 13780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). See *Kleindienst v. Mandel*, 408 U.S. 753, 777 (1972).

188. The full text of the provision is

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of

Branch to designate countries for immigration enforcement based on “whether the country or area is a safe haven for terrorists” or “whether a foreign terrorist organization has a significant presence in the country.”¹⁸⁹

Plaintiffs responded by pointing out that the Immigration and Nationality Act was amended in 1965 to prohibit discrimination on the basis of national origin.¹⁹⁰ Federal law states that “no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.”¹⁹¹ Canons of statutory construction make the later-in-time and more specific 1965

all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f) (2012). To the extent that § 1152(a) and § 1182(f) conflict on whether the President can bar the issuance of immigrant visas based on nationality, § 1152(a), the more specific provision, controls the more general § 1182(f). *See* 8 U.S.C. § 1152(a)(1)(A) (2012); *Edmond v. United States*, 520 U.S. 651, 657 (1997) (“Ordinarily, where a specific provision conflicts with a general one, the specific governs.”); *United States v. Smith*, 812 F.2d 161, 166 (4th Cir. 1987). Presidents Ronald Reagan, George H.W. Bush, Bill Clinton, George W. Bush, and Barack Obama have invoked this statute to issue executive orders limiting the admission of aliens. *See* Exec. Order 12,324, 46 Fed. Reg. 48,109 (Sept. 29, 1981) (Reagan); Proclamation 5517, 51 Fed. Reg. 30,470 (Aug. 22, 1986) (Reagan); Exec. Order 12,807, 57 Fed. Reg. 23,133 (May 24, 1992) (George H.W. Bush); Proclamation 6958, 61 Fed. Reg. 60,007 (Nov. 22, 1996) (Clinton); Proclamation 7359, 65 Fed. Reg. 60,831 (Oct. 10, 2000) (Clinton); Exec. Order 13,276, 67 Fed. Reg. 69,985 (Nov. 15, 2002) (George W. Bush); Exec. Order 13,692, 80 Fed. Reg. 12,747 (Mar. 8, 2015) (Obama); Exec. Order 13,726, 81 Fed. Reg. 23,559 (Apr. 19, 2016) (Obama). For further discussion of the scope of this provision, see Brief of Immigration Law Scholars as Amici Curiae Supporting Respondents, *Trump v. Int’l Refugee Assistance Project (IRAP)*, No. 16-1436, 2017 WL 4518553 (U.S. Oct. 10, 2017); *Trump v. Hawai’i*, (No. 16-1540), 2017 WL 4782860 (U.S. Oct. 24, 2017).

189. 8 U.S.C. 1187(a)(12)(D)(ii) (Supp I 2012); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.”). Article I of the U.S. Constitution entrusts the power to make immigration laws exclusively to Congress. *Galvan v. Press*, 347 U.S. 522, 531 (1954).

190. Immigration and Nationality Act, Amendments, Pub. L. No., 79 Stat. 911 89-236 (1965); *see also* Michael Lipka, *Muslims and Islam: Key Findings in the U.S. and Around the World*, PEW RES. CTR. (Aug. 9, 2017), <http://www.pewresearch.org/fact-tank/2017/05/26/muslims-and-islam-key-findings-in-the-u-s-and-around-the-world/>. For a history of the 1965 Immigration and Nationality Act, see *THE IMMIGRATION AND NATIONALITY ACT OF 1965: LEGISLATING A NEW AMERICA* (Gabriel J. Chin & Rose Cuison Villazor eds., 2015).

191. 8 U.S.C. § 1152 (a)(1) (2012). The contrast between these two provisions was recently discussed by former acting Attorney General Sally Yates and Republican Ted Cruz on Monday, May 8, 2017. Allan Smith, *Sally Yates and Ted Cruz Get into Heated Battle Over Trump’s Immigration Ban*, BUSINESS INSIDER (May 8, 2017, 5:46 PM), <http://www.businessinsider.com/sally-yates-ted-cruz-trump-travel-ban-muslim-immigration-2017-5>.

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provision take precedence over the earlier and more general 1952 provision.¹⁹² Although the 1965 provision does not include religion as an unlawful basis for government action in issuing immigrant visas, Trump's claim that national origin motivated his executive order put it squarely at odds with § 1152(a)(1) as to immigrant visas.¹⁹³ However, § 1152(a)(1)'s exclusion of nonimmigrants seeking or in possession of student, work, visitor, and other forms of temporary visas left these persons vulnerable to a categorical travel ban.¹⁹⁴ Nonetheless, with the exception of a court in Massachusetts,¹⁹⁵ federal district courts found plaintiffs challenging the first executive order were likely to win their claims on the merits and, as a consequence, enjoined enforcement of the travel ban.

On March 6, 2017, Trump issued a revised executive order that reiterated the national security justifications and made the following changes: (1) removal of Iraq from the list of countries, (2) removal of legal permanent residents from the order's applicability, (3) elimination of the exemption for religious minorities in the refugee ban, and (4) clarification that individuals with a valid visa were not subject to the executive order.¹⁹⁶ Again, plaintiffs sought injunctive relief to the amended executive order; and again the courts sided with the plaintiffs.¹⁹⁷

192. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183–87 (2012). § 1152(a)(1)(A) was enacted in 1965, after § 1182(f) was enacted in 1952.

193. Int'l Refugee Assistance Project (*IRAP*) v. Trump, 857 F.3d 554 (4th Cir.), *vacated*, No. 16-1436, 2017 WL 4518553 (U.S. Oct. 10, 2017).

194. 8 U.S.C. § 1152(a)(1).

195. *Id.*

196. *Hawai'i v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017); *Darweesh v. Trump*, No. 17 Civ. 480 (AMD), 2017 WL 388504 (E.D. N.Y. signed Jan. 28, 2017); *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. signed Feb. 3, 2017); Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); see also Adam Liptak, *Appeals Court Will Not Reinstate Trump's Revised Travel Ban*, N. Y. TIMES (May 25, 2017), **Error! Hyperlink reference not valid.** The amended executive order states that removing Iraq was justified because of special conditions, including the "close cooperative relationship between the United States and the democratically elected Iraqi government, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combat ISIS." Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,212 (Mar. 6, 2017).

197. *Washington v. Trump*, 847 F.3d 1151, 1151 (9th Cir. 2017); Order Granting Motion for Temporary Restraining Order, *Hawai'i v. Trump*, 241 F. Supp. 3d 1119; Int'l Refugee Assistance Project (*IRAP*) v. Trump, 241 F. Supp. 3d 539 (D. Md.), *aff'd in part*,

Despite the changes in language, courts were not persuaded by the government's denial that religious animus motivated the travel ban. In a ten to three vote, the Fourth Circuit held that Trump's statements about Muslims during his presidential campaign, coupled with his advisors' admissions, demonstrated Trump's intention to institute a travel ban based on religious identity in both the original and amended executive order.¹⁹⁸ The court found ample evidence of "a direct link between the President's numerous campaign statements promising a Muslim ban that targets territories, the discrete action he took only one week into office executing that exact plan, and EO-2, the 'watered down' version of that plan."¹⁹⁹ It also highlighted a report by the Department of Homeland Security that concluded that citizenship is not a reliable indicator of whether a particular individual poses a terrorist threat.²⁰⁰

For these reasons, the executive order was not "facially legitimate and bona fide" such that it warranted judicial probing of the government's stated national security purpose.²⁰¹ Courts found the primary purpose of the executive bans was not a secular one of preserving national security but rather a religious one of discriminating against Muslims.²⁰² The litigation over the travel bans demonstrates that, while the executive and legislative branches have broad power in the immigration arena, they must still comply with the Constitution.²⁰³

vacated in part, 857 F.3d 554 (4th Cir.), *vacated*, No. 16-1436, 2017 WL 4518553 (U.S. Oct. 10, 2017).

198. See *IRAP*, 857 F.3d at 557; *Green v. Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784 (10th Cir. 2009); *Glassroth v. Moore*, 335 F.3d 1282, 1284-85 (11th Cir. 2003).

199. *IRAP*, 857 F.3d at 599-600.

200. U.S. Dep't of Homeland Sec., *Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States*, <https://assets.documentcloud.org/documents/3474730/DHS-intelligence-document-on-President-Donald.pdf> (last visited Nov. 29, 2017).

201. *IRAP*, 857 F.3d at 557.

202. *Id.*

203. *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (dealing with indefinite detention of aliens); *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986) (dealing with admission and exclusion of aliens); see Kevin Johnson, Dean, UC Davis School of Law, Dreyfous Lecture on Civil Liberties and Human Rights at the Tulane University Law School Endowed Lecture Series: Immigration and Civil Rights in the Trump Administration (Mar. 20, 2017), <https://www.youtube.com/watch?v=JAnETPSR-4U> (arguing the Supreme Court has incrementally moved away from a regime of no judicial review in immigration enforcement);

I now turn to the courts' analysis in finding that anti-Muslim animus, not bona fide national security threats, motivated the travel ban cases.²⁰⁴ The plethora of evidence of Trump's longstanding hostility towards Islam and Muslims persuaded the courts that national origin was merely a subterfuge for an executive order motivated by religious animus.²⁰⁵ The same evidence could be brought forth in challenging a prospective Muslim registry.

A. The Establishment Clause for Citizens and Noncitizens

In finding Trump's original and amended executive orders legally suspect, judges highlighted the First Amendment mandate that "Congress shall make no law respecting an establishment of religion."²⁰⁶ The Establishment Clause requires "governmental neutrality between religion and religion"²⁰⁷ and "that one religious denomination cannot be officially preferred over another."²⁰⁸ When government action is suspected of having a religious objective, courts apply the "objective observer" test to examine "readily discoverable facts" including the "text, legislative history, and implementation" of the action.²⁰⁹

Courts use two tests to enforce the Establishment Clause: the *Larson* test and the *Lemon* test. In *Larson v. Valente*, the Supreme Court held that if a law facially discriminates among religions, it can survive only if it is "closely fitted to the furtherance of any compelling interest asserted," also known as the strict scrutiny test in

Erin Delaney, *Immigration in the Age of Trump*, U. ILL. L. REV. ONLINE (Apr. 2017), <https://illinoislawreview.org/symposium/first-100-days/immigration-in-the-age-of-trump/> (suggesting that the extreme nature of President Trump's immigration positions might result in courts revisiting the plenary power doctrine).

204. *But see* Khaled A. Beydoun, "Muslim Bans" and the (Re)Making of Political Islamophobia, 2017 ILL. L. REV. 1733 (arguing Trump's ban is the first time America banned Muslims from entering and naturalizing).

205. *See infra* Part I.

206. U.S. CONST. amend. I.

207. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

208. *Larson v. Valente*, 456 U.S. 228, 244 (1982); *accord* *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 875–76 (2005) ("[T]he government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals . . .").

209. *McCreary Cty.*, 545 U.S. at 862–63; *ACLU of Ky. v. Grayson Cty.*, 591 F.3d 837, 854 (6th Cir. 2004) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)).

constitutional jurisprudence.²¹⁰ If a law is facially neutral as to religion, *Lemon v. Kurtzman* provides an alternative test requiring that the government action (1) must have a primary secular purpose, (2) may not have the principal effect of advancing or inhibiting religion, and (3) may not foster excessive entanglement with religion.²¹¹

1. A Facially Discriminatory Registry

A special registration program that explicitly targets Muslims will trigger strict scrutiny, pursuant to the *Larson* test. A legal challenge to a de jure Muslim registry would succeed on the merits if the claimants can prove that the law facially discriminates against Islam and is not narrowly tailored in furtherance of a compelling government interest. Because national security is frequently accepted by courts as a compelling government interest,²¹² the crux of the legal dispute will center on whether imposing special registration on Muslims—regardless of their citizenship, ties to the United States, and individual behavior—is narrowly tailored to serve national security.²¹³

The Tenth Circuit's ruling in *Awad v. Ziriax* is informative here. An Oklahoma constitutional amendment was passed by public referendum that prohibited consideration of international law in Oklahoma courts. The Tenth Circuit upheld the lower court's preliminary injunction on Establishment Clause grounds.²¹⁴ Oklahoma's constitutional amendment, tellingly entitled "Save Our State," intended to ban only one form of international law—Shari'a law (also known as Islamic law).²¹⁵ Because the law facially discriminated against Islam, it was subject to strict scrutiny.²¹⁶ The court found no compelling state interest existed because "abstract

210. *Larson*, 456 U.S. at 255.

211. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); *see, e.g.*, *Hernandez v. Comm'r*, 490 U.S. 680, 695 (1989).

212. *See Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

213. *Awad v. Ziriax*, 670 F.3d 1111, 1127 (10th Cir. 2012) (quoting *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1266 (10th Cir. 2008)).

214. *See Awad*, 670 F.3d at 1111.

215. *Id.* at 1129–30.

216. *Id.* at 1128–29.

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principles do not satisfy the government’s burden to articulate a compelling interest.”²¹⁷ The government did not offer any reasoning for the distinction, and instead offered “[m]ere speculation of harm” from Muslims that “does not constitute a compelling state interest.”²¹⁸ In finding that Awad was likely to prevail in his Establishment Clause claim, the court concluded that he suffered harm in the form of condemnation of his religion, stigmatization, and exposure to disfavored treatment.²¹⁹ The same reasoning was applied by the Fourth Circuit in *IRAP v. Trump* in enjoining enforcement of the travel ban. The Fourth Circuit recognized that stigmatization arising from the travel ban targeting Muslim majority countries is a cognizable injury for standing purposes.²²⁰

Should the Trump administration require only Muslims to register, the government may be found to show preference to other religions over Islam in the same way the Oklahoma Legislature did in prohibiting only Islamic law in *Awad*. That is, the government would convey a clear message of disapproval of Islam and an otherization of Muslims as permanent outsiders of the political community regardless of their citizenship.²²¹

To be sure, the government would insist that preventing terrorism is a compelling state interest and point to the history of Al Qaeda and the Islamic State of Iraq and Syria’s (ISIS) targeting U.S. interests.²²²

217. *Id.* at 1130.

218. *Id.* at 1129 (alteration in original) (quoting *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 540, 543 (1980)).

219. *Id.* at 1122–23.

220. *Int’l Refugee Assistance Project (IRAP) v. Trump*, 857 F.3d 554, 586 (4th Cir. 2017). The dissenting opinion, however, argued that stigmatization alone was insufficient to be a cognizable injury. *Id.* at 659–67 (Agee, J., dissenting).

221. *Smith v. Jefferson Cty. Bd. of Sch. Comm’rs*, 788 F.3d 580, 587 (6th Cir. 2015); *see IRAP*, 857 F.3d at 582 (“[T]he core objectives of modern Establishment Clause jurisprudence has been to prevent the State from sending a message to non-adherents of a particular religion ‘that they are *outsiders*, not full members of the political community.’” (quoting *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2012))). Even if lawful, the government has no way of identifying who is Muslim because the U.S. Census Bureau does not track religion and individuals are more likely not to voluntarily self-identify if faced with adverse government action on account of their religion. *A Brief History of Religion and the U.S. Census*, PEW RES. CTR. (Jan. 26, 2010), <http://www.pewforum.org/2010/01/26/a-brief-history-of-religion-and-the-u-s-census/>.

222. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (“[T]he

The government may then reason that Muslims in the United States are most likely to be recruited to conduct a terrorist attack on behalf of Al Qaeda and ISIS and thus warrant tracking.²²³ But the government will be hard pressed to find credible objective evidence showing a person's religion per se makes her susceptible to becoming a terrorist. Indeed, of the estimated 3.3 million Muslims in the U.S., less than 500 have been charged with terrorism in the last sixteen years.²²⁴ Without a causal link between Islam and terrorism, a court may find the primary or predominant purpose for special registration is religious animus, thereby striking down the special registration program for violating the Establishment Clause.

2. *Facially Neutral Registry*

For the aforementioned reasons, future legislation or executive order imposing special registration is unlikely to explicitly name Islam or Muslims. Rather, like the travel bans currently being litigated, the language would target persons with origins from Muslim majority countries.²²⁵ The government would rely on its plenary authority in immigration as well as invoke judicial deference in national security to argue the rational basis test should apply.²²⁶

Government's interest in combating terrorism is an urgent objective of the highest order."); Haig v. Agee, 453 U.S. 280, 307 (1981); Michael Lipka, *Muslims and Islam: Key Findings in the U.S. and Around the World*, PEW RES. CTR. (Aug. 9, 2017), <http://www.pewresearch.org/fact-tank/2017/05/26/muslims-and-islam-key-findings-in-the-u-s-and-around-the-world/>.

223. Rukmini Callimachi, *ISIS and the Lonely Young American*, N.Y. TIMES (June 27, 2015), <https://www.nytimes.com/2015/06/28/world/americas/isis-online-recruiting-american.html>; Alessandria Masi, *Here's How ISIS Recruits Westerners*, BUS. INSIDER (Sept. 10, 2014, 2:11 PM), <http://www.businessinsider.com/how-isis-recruits-westerners-2014-9>; Alessandria Masi, *ISIS Recruiting Westerners: How The 'Islamic State' Goes After Non-Muslims and Recent Converts in the West*, INT'L BUS. TIMES (Sept. 8, 2014, 11:24 AM), <http://www.ibtimes.com/isis-recruiting-westerners-how-islamic-state-goes-after-non-muslims-recent-converts-west-1680076>.

224. Kurzman, *supra* note 173, at 2. The Pew Research Center estimates the number of Muslims in the United States is 3.3 million. Besheer Mohamed, *A New Estimate of the U.S. Muslim Population*, PEW RES. CTR. (Jan. 6, 2016), <http://www.pewresearch.org/fact-tank/2016/01/06/a-new-estimate-of-the-u-s-muslim-population/>.

225. Reply in Support of Emergency Motion for Stay Pending Appeal at 6–11, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105).

226. See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 83 (1976) (considering whether a law that made distinctions based on alien status was “wholly irrational”); *Guzman v. U.S. Dep’t of Homeland Sec.*, 679 F.3d 425, 432 (6th Cir. 2012) (“[D]eference to Congress with respect to

In adjudicating Establishment Clause cases, courts interrogate whether the stated secular purpose is “genuine, not a sham, and not merely secondary to a religious objective.”²²⁷ A Muslim registry that is facially neutral will be struck down if it has the effect of inhibiting Islam and entangling the government in regulating Islam pursuant to the *Lemon* test. Opponents of a de facto Muslim registry could argue that Trump’s established record of anti-Muslim and islamophobic statements over the course of his two-year presidential campaign and tenure as President is evidence that a Muslim registry is based on religious animus rather than a secular national security purpose.²²⁸ Although courts normally exercise judicial deference in the area of national security (and immigration law), multiple abuses of executive authority have caused judges to be more skeptical of claims using broad national security justifications that implicate constitutional rights.²²⁹

A federal district judge in Hawaii, for example, found in the Muslim ban case that “the entirety of the Executive Order runs afoul of the Establishment Clause,” which prohibits the government from

immigration law has led this court to uphold statutory distinctions between classes of aliens if predicated on a rational basis.” (citing *Hamama v. INS*, 78 F.3d 233, 237 (6th Cir. 1996))). *But see* *United States v. Robel*, 389 U.S. 258, 263–64 (1967) (rejecting the invocation of national security as a “talismanic incantation” that can support any and all exercise of executive power). *See generally* Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The “Plenary Power” Justification for On-Going Abuses of Human Rights*, 10 *ASIAN L.J.* 13 (2003) (reviewing the human rights consequences of the judicial application of the plenary power doctrine announced in the Chinese Exclusion Case).

227. *McCreary Cty. v. ACLU*, 545 U.S. 844, 864 (2005).

228. *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (establishing a three-part test wherein the law at issue (1) must have a primary secular purpose, (2) may not have the principal effect of advancing or inhibiting religion, and (3) may not foster excessive entanglement with religion); *see also infra* Part I.

229. *See, e.g.*, Geoffrey R. Stone, *National Security v. Civil Liberties*, 95 *CALIF. L. REV.* 2203, 2209 (2007) (“[C]ourts must closely scrutinize invocation of military necessity and national security as justification for limiting civil liberties.”). Numerous courts reviewing challenges to the travel ban have rejected the government’s argument that executive immigration actions are unreviewable. *See Hawai’i v. Trump*, 245 F. Supp. 3d 1227, 1235 (D. Haw. 2017) (noting that every court to have considered the constitutionality of either executive order has rejected the Government’s argument that the Court’s review “ends at the Executive’s door”); *Int’l Refugee Assistance Project (IRAP) v. Trump*, 241 F. Supp. 3d 539, 561–62 (D. Md. 2017), *aff’d in part*, 857 F.3d 554 (4th Cir. 2017); *Sarsour v. Trump*, 245 F. Supp. 3d 719, 736 (E.D. Va. 2017); *Aziz v. Trump*, 234 F. Supp. 3d 724, 732–33 (E.D. Va. 2017) (stating that Congress cannot “delegate to the president the power to violate the Constitution”).

disfavoring a particular religion.²³⁰ In evaluating Trump's travel ban, the court looked to Trump's anti-Muslim rhetoric prior to taking office. His multiple inflammatory statements against Muslims during his presidential campaign further evinced a hostility toward Islam.²³¹ In addition to the statements described in Part I, the court highlighted the Trump presidential campaign's press release in stating:

Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on. According to Pew Research, among others, there is great hatred towards Americans by large segments of the Muslim population. Most recently, a poll from the Center for Security Policy released data showing "25% of those polled agreed that violence against Americans here in the United States is justified as a part of the global jihad" and 51% of those polled, "agreed that Muslims in America should have the choice of being governed according to Shariah." Shariah authorizes such atrocities as murder against non-believers who won't convert, beheadings and more unthinkable acts that pose great harm to Americans, especially women.²³²

Religious minorities in the six Muslim-majority countries, Christians in particular, were not subject to the first executive order, thereby demonstrating that nationality was a proxy for an otherwise religion-based executive order.²³³ Indeed, Trump boasted on the

230. *Hawai'i*, 245 F. Supp. 3d at 1238; see also *McCreary Cty.*, 545 U.S. at 860; *Hawaii Judge Extends Order Blocking Trump's Travel Ban*, N.Y. TIMES (Mar. 29, 2017), <https://www.nytimes.com/2017/03/29/us/politics/travel-ban-trump-judge-hawaii.html>.

231. For a summary of anti-Muslim rhetoric and initiatives of Donald Trump prior to and post-election, see FAIZA PATEL & RACHEL LEVINSON-WALDMAN, BRENNAN CTR. FOR JUSTICE, THE ISLAMOPHOBIC ADMINISTRATION, https://www.brennancenter.org/sites/default/files/publications/BCJ_Islamophobic_Administration.pdf (last visited Nov. 22, 2017) (noting that hate crimes against Muslims have soared since Trump took office).

232. Press Release, *supra* note 16.

233. Ben Kamisar, *Trump Weighing Muslim Registry, Says Adviser*, HILL (Nov. 16, 2016, 12:24 PM), <http://thehill.com/policy/national-security/306370-trump-weighing-muslim-registry-says-adviser>. The executive order prioritized refugee claims for religious minorities from the banned Muslim-majority countries, stating, "[T]he Secretary of State . . . is further directed to make changes . . . to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion." Exec. Order No. 13769, 82 Fed. Reg. 8977, 8979 (Jan. 27, 2017). Trump has previously said in an interview that Christian refugees will be given priority over non-Christian refugees attempting to enter the country, claiming Christians have been "horribly treated." See Daniel Burke, *Trump*

Christian Broadcasting Network on January 27, 2017, that he plans to give priority to Christian refugees.²³⁴ Trump also exempted persons from the seven countries who held dual Israeli citizenship, thereby exempting persons likely to be Jewish from the travel ban.²³⁵

Moreover, the reference to “honor killings” as a basis for excluding persons from entry was a thinly veiled reference to Muslims.²³⁶ The amended executive order retained the provision instructing the Secretary of Homeland Security to collect and report on “information regarding the number and types of acts of gender-based violence against women, including so-called ‘honor killings,’ in the United States by foreign nationals.”²³⁷ Using a term that perpetuates Orientalist stereotypes of Muslim men as misogynist is further evidence of Trump’s anti-Muslim animus.²³⁸ As Leti Volpp notes, honor crimes “are mistakenly thought to be a uniquely Muslim practice and specific to Muslim communities” and frequently cited by noted islamophobes to vilify Muslims.²³⁹ Finally, the White House issued the first executive order without input from the Department of

Says US Will Prioritize Christian Refugees, CNN POL. (Jan. 30, 2017, 11:28 AM), <http://www.cnn.com/2017/01/27/politics/trump-christian-refugees/> (quoting Trump in an interview with Christian Broadcasting Network).

234. David Brody, *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority as Refugees*, CBN NEWS (Jan. 27, 2017), <http://www1.cbn.com/thebrodyfile/archive/2017/01/27/brody-file-exclusive-president-trump-says-persecuted-christians-will-be-given-priority-as-refugees>.

235. *Message from U.S. Embassy Tel Aviv Consular Section*, U.S. EMBASSY ISR., <http://bit.ly/2l0KWb8> (last visited Jan. 6, 2018).

236. The “Purpose” section of the executive order states that “the United States should not admit those who engage in acts of bigotry or hatred (*including ‘honor’ killings*, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation.” Exec. Order No. 13769, 82 Fed. Reg. at 8977 (emphasis added). Section 10 on “Transparency and Data Collection” also mandates the Secretary of Homeland Security to regularly “collect and make publicly available . . . information regarding the number and types of acts of gender-based violence against women, including honor killings, in the United States by foreign nationals.” *Id.* at 8980–81.

237. Exec. Order No. 13780, 82 Fed. Reg. 13209, 13212 (Mar. 6, 2017).

238. See Lila Abu-Lughod, *Seductions of the ‘Honor Crime,’* DIFFERENCES, Spring 2011, at 17.

239. Leti Volpp, *Trump’s Mentions of ‘Honor Killings’ Betray the Truth of His ‘Muslim Ban,’* HILL (Feb. 22, 2017, 1:00 PM), <http://thehill.com/blogs/pundits-blog/immigration/320632-trumps-mention-of-honor-killings-betray-the-truth-of-his>.

Justice or relevant national security agencies, thereby undermining its claims that national security informed the executive order.²⁴⁰

The disparate impact of a de facto registry on Muslims will inevitably inhibit the practice of Islam, thereby violating the second prong of the *Lemon* test. People would likely hide their Muslim identity, fear attending mosques, fear giving religious tithing, and otherwise change how they practice their faith to avoid stigmatization and unfavorable government attention.²⁴¹ A de facto Muslim registry may also affect how Imams manage their mosques to shield their congregants from civil liberties violations.²⁴² For example, they would likely censor their sermons in ways that are not based on their independent religious judgments but rather fear of government persecution. It may also be more difficult for Muslim American communities to engage in interfaith activities, as people of other faiths may view them as suspect and disloyal. For these reasons, the lower courts granted plaintiffs' motion for a temporary restraining order.

The Muslim ban litigation illustrates that the legality of a prospective Muslim registry depends largely on how the proposal is written and what courts find to be the underlying motivations of the special registration program. Because the plenary power doctrine

240. See Int'l Refugee Assistance Project (*IRAP*) v. Trump, 241 F. Supp. 3d 539 (D. Md. 2017); Kim Soffen & Darla Cameron, *How Trump's Travel Ban Broke from the Normal Executive Order Process*, WASH. POST (Feb. 9, 2017), <https://www.washingtonpost.com/graphics/politics/trump-travel-ban-process/>.

241. See Sahar F. Aziz, *Policing Terrorists in the Community*, 5 HARV. NAT'L SEC. L.J. 147 (2014) (describing the outcomes of Muslims fearing prosecution); Aziz, *supra* note 29 (same); see also *IRAP*, 241 F. Supp. at 561–62 (“Courts have recognized that for purposes of an Establishment Clause claim, non-economic, intangible harms to ‘spiritual, value-laden beliefs’ can constitute a particularized injury sufficient to support standing.” (quoting *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997))), *aff'd in part*, 857 F.3d 554 (4th Cir. 2017); *Awad v. Ziriax*, 670 F.3d 1111, 1122–23 (10th Cir. 2012) (holding that a Muslim plaintiff residing in Oklahoma suffered a cognizable injury in the form of condemnation of his religion and exposure to “disfavored treatment” based on a voter-approved state constitutional amendment prohibiting Oklahoma state courts from considering Sharia law); *Catholic League for Religious & Civil Rights v. City & Cty. of S.F.*, 624 F.3d 1043, 1048 (9th Cir. 2010) (stating that a “psychological consequence” constitutes a concrete injury where it “is produced by government condemnation of one’s own religion or endorsement of another’s in one’s own community”).

242. See, e.g., Rowaida Abdelaziz, *Muslims Once Again Are Being Targeted for an Attack They Had Nothing to Do With*, HUFFINGTON POST (Nov. 3, 2017, 5:45 AM), https://www.huffingtonpost.com/entry/muslims-terrorist-attack-islamophobia_us_59fb855ae4b0b0c7fa390f95.

mandates judicial deference to the executive branch on immigration and courts regularly exercise heightened judicial deference on national security and foreign relations matters,²⁴³ legal disputes will likely center around the extent to which individual rights can be circumscribed in the name of national security, including equal protection rights under the Fifth Amendment.²⁴⁴ I now explore such claims in more detail.

B. Alienage, Citizenship, and Equal Protection Rights

Noncitizen Muslims in the United States, whether lawfully or unlawfully present, have standing to file constitutional claims. The Supreme Court in *Plyler v. Doe* found that noncitizens in the United States can claim constitutional protection if they are physically present within the boundaries of the country.²⁴⁵ *Plyler* arose when a school in

243. See *Zadvydas v. Davis*, 533 U.S. 678, 678 (2001); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009) (stating that the decision on who may be admitted to the United States and what term “has been a matter of political determination by each State—a matter wholly outside the concern and competence of the Judiciary”), *vacated*, 559 U.S. 131 (2010). *But see* *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–34 (2010) (explaining that, where the Executive had concluded that material support to terrorist organizations “will ultimately inure to the benefit of their criminal, terrorist functions,” the “evaluation of the facts by the Executive . . . is entitled to deference” because it “implicates sensitive and weighty interests of national security and foreign affairs”); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (rejecting national security arguments to justify government restrictions on the press’s freedom of speech); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (rejecting national security as a basis for taking possession of private property in order to keep labor disputes from stopping production during wartime).

244. *Narenji v. Civiletti*, 617 F.2d 745, 748 (D.C. Cir. 1980) (“Certainly in a case such as the one presented here it is not the business of courts to pass judgment on the decisions of the President in the field of foreign policy. Judges are not expert in that field and they lack the information necessary for the formation of an opinion. The President on the other hand has the opportunity of knowing the conditions which prevail in foreign countries, he has his confidential sources of information and his agents in the form of diplomatic, consular and other officials.” (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)). *But see* Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57 (2015) (arguing Supreme Court jurisprudence has narrowed the plenary doctrine over the years). *See generally* Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (analyzing the modern vitality of the plenary power doctrine). For articles discussing the highly deferential stance of the courts in national security cases, see Robert Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361 (2009); Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827 (2013).

245. *See Plyler v. Doe*, 457 U.S. 202, 212 (1982). *See generally* Angela D. Morrison &

Texas sought to exclude unauthorized immigrant children from attending school pursuant to a Texas law permitting the withholding of state funds from school districts with unauthorized immigrant students.²⁴⁶ The children sought declaratory and injunctive relief.²⁴⁷ Whether the children were subject to the Equal Protection Clause was a threshold issue before the Court.²⁴⁸ Because the Equal Protection Clause provides that no state shall “deny to *any person* within its jurisdiction” equal protection, the court held the children’s presence in United States gave them standing to bring an equal protection claim.²⁴⁹

The question remains, however, whether the court would find a federal immigration law (as opposed to a state school funding law) in violation of equal protection when balanced against the plenary powers doctrine and judicial deference in national security. Indeed, the Supreme Court has found that constitutional rights do not always apply in the same way for immigrants as they do for citizens.²⁵⁰ Additionally, an equal protection claim requires plaintiffs, regardless of citizenship, to show disparate treatment, or an *intent* to discriminate based on race, religion, gender, or national origin.²⁵¹

Targets of a Muslim registry could demonstrate disparate treatment in one of three ways: (1) the program classifies people on the basis of race, religion, or national origin; (2) a facially neutral program is applied in an intentionally discriminatory manner; or (3) a facially neutral program is motivated by discriminatory animus and its application produces a discriminatory effect.²⁵² Though the United

David B. Thronson, *Beyond Status: Seeing the Whole Child*, 33 EVALUATION & PROGRAM PLAN. 281 (2010) (noting the competing values between U.S. immigration law and child welfare law).

246. *Plyler*, 457 U.S. at 202.

247. *Id.*

248. *Id.*

249. *Id.* (emphasis added).

250. *Reno v. Flores*, 507 U.S. 292, 305–06 (1993) (“[I]n the exercise of its broad power over immigration and naturalization, ‘Congress regularly makes rules that would be unacceptable if applied to citizens.’” (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977))); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990).

251. *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *McCleskey v. Kemp*, 481 U.S. 279, 291–99 (1987); *Washington v. Davis*, 426 U.S. 229, 240 (1976) (requiring discriminatory animus and injury to plaintiffs).

252. *Davis*, 426 U.S. at 240; *Hayden v. Cty. of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999);

States has a history of immigration bans based on national origin,²⁵³ there has yet to be an immigration ban or special registration explicitly based on religion.²⁵⁴ This is likely because a federal registry of U.S. citizens and noncitizens based solely on religion would run afoul of the First Amendment's Establishment Clause, as discussed in section V.A.

Under a Fifth Amendment equal protection analysis, religion, like race and national origin, is considered a suspect class, thereby requiring strict scrutiny when determining whether a government action comports with the Constitution.²⁵⁵ The government would have to prove the action is justified by a compelling government interest and is narrowly tailored to advance that interest. Singling out Muslims en masse for special registration, and by extension mass surveillance, is unlikely to be based on a compelling government interest because not every Muslim is engaged in activity threatening the national security of the United States.²⁵⁶ To the contrary, most terrorist attacks in the United States are conducted by members of white supremacist groups, Muslims are within the ranks of law

cf. Hartman v. Moore, 547 U.S. 250, 259–61 (2006); Turkmen v. Ashcroft, 915 F. Supp. 2d 314 (E.D.N.Y. 2013), *aff'd in part*, Turkmen v. Hasty, 789 F.3d 218 (2d Cir. 2015).

253. *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581 (1889). In *Chae Chan Ping*, also called the Chinese Exclusion Case, the U.S. Government denied Chinese laborers reentry into the country following the passage of the Scott Act of 1888, which was an addition to the Chinese Exclusion Act of 1882. *Id.* at 596–99. Those denied entry argued that the Act conflicted with the Burlingame Treaty of 1868, which provided them with licenses to enter the country. *Id.* at 600. The Court held that foreign treaties cannot affect Congress' authority, and that Congress can broadly disallow entry into the United States by certain groups of people who may threaten the country. *Id.* at 609. This decision provides precedent for the Supreme Court's deference to Congress on immigration decisions and Congress' broad plenary power over immigration.

254. *See The Trump Memos, supra* note 54, at 4; *see also* Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999) (stating that deportation may not be based upon an unjustifiable standard such as race or religion).

255. Many courts across the United States have held that religion is a "suspect" class similar to race or national origin in Equal Protection claims. Harbin-Bey v. Rutter, 420 F.3d 571, 576 (6th Cir. 2005) (holding that when a government action "invades a 'fundamental right,' such as speech or religious freedom, the law will be sustained only if it is 'suitably tailored to serve a compelling state interest'" (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985))); *see also* *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Hassan v. City of New York*, 804 F.3d 277, 299 (3d Cir. 2015); *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 804 (9th Cir. 2011); *Abcarian v. McDonald*, 617 F.3d 931, 938 (7th Cir. 2010).

256. *The Trump Memos, supra* note 54, at 11–12.

enforcement,²⁵⁷ and Muslims have reported suspicious terrorist activity to law enforcement.²⁵⁸

Moreover, sweeping approximately three to six million people into a surveillance dragnet via special registration is not a narrow tailoring of terrorism prevention. Similar to the case of Japanese internment, individuals are presumed suspect based on an immutable characteristic rather than individual culpability or specific behavior. To withstand a strict scrutiny test, the government would have to provide more detailed criteria beyond mere religious affiliation or national origin and prove the criteria is directly tied to specific national security threats.²⁵⁹ This is a tall order before a judiciary increasingly skeptical of far-reaching executive action in the name of national security.²⁶⁰

Even if the government can prove a compelling state interest exists, a court is unlikely to accept that a blanket registration of all Muslims—regardless of criminal records, known ties to terrorism, or individualized suspicious behavior—based solely on religion or national origin is narrowly tailored.²⁶¹ For example, in the travel ban

257. *Muslim NYPD Officer on Advice He Gives Bullied Daughter*, CBS NEWS (Aug. 23, 2016), <https://www.cbsnews.com/news/muslim-nypd-officer-jamiel-altaheri-optimistic-despite-facing-challenges/> (noting 1000 New York City police officers are Muslim).

258. Ellen Nakashima, *Domestic Extremists Have Killed More Americans than Jihadists Since 9/11. How the Government Is Responding*, WASH. POST (Oct. 15, 2015), <http://wapo.st/1Qh8Kft>; William Parkin et al., *Analysis: Deadly Threat from Far-Right Extremists Is Overshadowed by Fear of Islamic Terrorism*, PBS NEWSHOUR (Feb. 24, 2017, 6:53 PM), <http://www.pbs.org/newshour/updates/analysis-deadly-threat-far-right-extremists-over-shadowed-fear-islamic-terrorism/>; see Mohammed A. Malik, *I Reported Omar Mateen to the FBI. Trump Is Wrong that Muslims Don't Do Our Part*, WASH. POST (June 20, 2016), <https://perma.cc/J759-39T2> (providing a firsthand account of a Muslim American who reported the Orlando shooter, Omar Mateen, to the FBI in 2014 after observing suspicious behavior). See generally Huyen Pham, *Problems Facing the First Generation of Local Immigration Laws*, 36 HOFSTRA L. REV. 1303, 1308–09 (2008) (noting the concern by law enforcement that immigrants will not report crimes or assist with criminal investigations).

259. *But see* *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (noting that the President is not obligated to disclose his “reasons for deeming nationals of a particular country a special threat . . . and even if [he] did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy”).

260. See *Int'l Refugee Assistance Project (IRAP) v. Trump*, 857 F.3d 554 (4th Cir. 2017) (blocking the travel ban); *Hawai'i v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017) (same).

261. Similar to an Establishment Clause claim, proving a compelling state interest would require construction and actual interest instead of perceived harm or fear of harm. See *Awad v. Ziriax*, 670 F.3d 1111, 1120 (10th Cir. 2012). In *Awad*, the Oklahoma House and Senate passed a resolution forbidding the consideration of Sharia law in Oklahoma courts, and an

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cases, the Ninth Circuit noted that “the Order does not tie these nationals in any way to terrorist organizations within the six designated countries. It does not identify these nationals as contributors to active conflict or as those responsible for insecure country conditions.”²⁶² Additionally, the Supreme Court has recognized that “[t]he specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker’s purposes.”²⁶³ A Muslim registry following Trump’s Muslim ban would likely cause further judicial concerns that religious animus, not legitimate national security interests, is the underlying motive.

That said, the government may attempt to rely on the Supreme Court’s rulings in *Korematsu* and *Hirabayashi*.²⁶⁴ *Korematsu* found national security to be a compelling government interest during World War II when it upheld an executive order detaining and interning Japanese Americans and nationals of Japan solely based on their national origin.²⁶⁵ *Hirabayashi* rejected an equal protection claim challenging Congressional action that imposed a curfew on all Japanese nationals and Japanese Americans.²⁶⁶ Of course, the fundamental difference between registration and internment of Japanese nationals and Japanese Americans and a prospective Muslim registry of noncitizens and Americans is religion, not national origin, as the identity trait of targeted groups.

Even if a Muslim registry of immigrants is judicially sanctioned,

Oklahoma resident challenged the resolution on Establishment Clause grounds. *Id.* at 1116–17. The court held that merely speculated or perceived harm did not meet the burden of demonstration a compelling state interest. *Id.* at 1130.

262. *Hawai’i v. Trump*, 859 F.3d 741, 772 (9th Cir. 2017).

263. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

264. *See generally* YAMAMOTO ET AL., *supra* note 18 (noting that *Korematsu* continues to be cited by courts in equal protection and national security cases).

265. *Korematsu v. United States*, 323 U.S. 214, 219 (1944); Fritz Snyder, *Overreaction Then (Korematsu), and Now (The Detainee Cases)*, 2 CRIT. 80, 91 (2009). *But see* YAMAMOTO ET AL., *supra* note 18, at 159 (noting that at the black-letter, legal doctrine level, the majority in *Korematsu* contradicted itself because it stated that strict scrutiny was the standard for racial classifications but found the case was not about race, thereby deferring to the government’s claim of military necessity).

266. *Hirabayashi v. United States*, 320 U.S. 81, 91 (1943) (noting that “Congress, by the Act of March 21, 1942, ratified and confirmed Executive Order No. 9066” and as such legalized the curfew).

the question remains whether special registration of U.S. citizens is politically and legally plausible.²⁶⁷

V. THE (UN)LIKELIHOOD OF A MUSLIM REGISTRY FOR U.S. CITIZENS

Shortly after the 9/11 terrorist attacks, calls to racially profile and intern Muslims and Arabs circulated among some political circles.²⁶⁸ Another major attack on U.S. soil could prompt similar debates. Proponents of a Muslim registry may seek to broadly define national origin to include naturalized and U.S.-born Americans whose country of origin is a Muslim majority country.²⁶⁹ Pointing to U.S. citizen terrorism suspects such as the Times Square bomber or New York City subway bomber, the government might seek to register all citizens based on ancestry.²⁷⁰ The (mis)treatment of Japanese Americans during World War II is edifying.

Like the registration and internment of Japanese Americans, government officials would have to define national origin broadly to include Americans whose ancestry is from countries with active terrorist activities or whose citizens have engaged in terrorism against the U.S.²⁷¹ On February 19, 1942, President Franklin D. Roosevelt

267. Robert E. Pierre, *Fear and Anxiety Permeate Arab Enclave Near Detroit*, WASH. POST (Aug. 4, 2002), https://www.washingtonpost.com/archive/politics/2002/08/04/fear-and-anxiety-permeate-arab-enclave-near-detroit/1427f8ba-e495-4bef-8bab-03daf2aa2edc/?u_tm_term=.51206496aa24; see Wadhia, *supra* note 127, at 672 (noting that 9/11 revealed how immigration laws borne out of national security concerns can result in everlasting damage for affected individuals).

268. Cam Simpson, Flynn McRoberts & Liz Sly, *Immigration Crackdown Shatters Muslims' Lives*, CHI. TRIB. (Nov. 16, 2003), <http://www.chicagotribune.com/news/watchdog/chi-0311160374nov16-story.html>.

269. Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 492–502 (1945).

270. Mosi Secret, *Terror Defendant Convicted in New York Subway Plot*, N.Y. TIMES (May 1, 2012), <http://www.nytimes.com/2012/05/02/nyregion/terror-defendant-convicted-in-plot-to-bomb-new-york-subways.html?mcubz=1>; Michael Wilson, *Shahzad Gets Life Term for Times Square Bombing Attempt*, N.Y. TIMES (Oct. 5, 2010), <http://www.nytimes.com/2010/10/06/nyregion/06shahzad.html?mcubz=1>.

271. *Hirabayashi*, 320 U.S. at 101 (“The adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions

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signed Executive Order 9066, authorizing detention of Japanese Americans to designated internment camps.²⁷² From 1942 to 1946, approximately 120,000 Japanese and Japanese Americans were forced to relocate to camps across the country established by the War Relocation Authority.²⁷³ Not only did they lose their liberty, but they also lost their property and means of livelihood.

Almost two-thirds of the Japanese internees were American citizens, and one-fourth were children and infants.²⁷⁴ Conditions of the internment camps were inhumane. Many camps were converted livestock areas, with some livestock moved a few days prior to internees' arrival.²⁷⁵ Forced to move to the camps without warning, Japanese internees were treated like prisoners, remaining in them for months and, in some cases, years after World War II.²⁷⁶ Though sympathetic organizations like the American Civil Liberties Union opposed the internments, many Americans supported the order, and no substantial public opposition campaign occurred.²⁷⁷

In an act of resistance, twenty-three-year-old Fred Korematsu, an American citizen of Japanese ancestry, remained in his home of San Leandro, California, instead of reporting to his camp location.²⁷⁸ He was convicted of violating the executive order, which was found to be constitutional because the executive branch had the authority to enact such restrictions when a "pressing public necessity" is present.²⁷⁹ As a

are irrelevant.").

272. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

273. Taylor Weik, *Behind Barbed Wire: Remembering America's Largest Internment Camp*, NBC NEWS (Mar. 16, 2016, 4:03 AM), <http://www.nbcnews.com/news/asian-america/behind-barbed-wire-remembering-america-s-largest-internment-camp-n535086>.

274. Alison Dundes Renteln, *A Psychohistorical Analysis of the Japanese American Internment*, 17 HUM. RTS. Q. 618, 619–20 (1995).

275. *Id.* at 620.

276. *Id.* at 621.

277. See WENDY NG, JAPANESE AMERICAN INTERNMENT DURING WORLD WAR II: A HISTORY AND REFERENCE GUIDE 20 (2002); Deborah J. Schildkraut, *The Dynamics of Public Opinion on Ethnic Profiling After 9/11: Results from a Survey Experiment*, 53 AM. BEHAV. SCIENTIST 61, 64 (2009) (noting that "[a] 1942 survey by the National Opinion Research Center found that 93% of Americans felt that the government was doing the right thing with [Japanese] internment").

278. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

279. *Id.*

result, the Court denied Korematsu's request to "reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population . . . [who] could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety."²⁸⁰

Decades later, a Congressional commission exposed the fallacy of the government's claim that mass internment was a "military necessity."²⁸¹ The Commission on Wartime Relocation and Internment of Civilians concluded that no evidence supported the claim of military necessity for internment, and that it was instead the result of "race prejudice, war hysteria and a failure of political leadership."²⁸² Lower federal courts vacated the convictions of Korematsu and Hirabayashi, another internee, in the 1980s after finding the executive branch intentionally omitted exculpatory evidence from the Supreme Court. The U.S. government subsequently issued a public apology.²⁸³ Despite this, *Korematsu* has not been overturned by the Supreme Court or repealed by legislative action. Thus, mass internment of U.S. citizens and noncitizens remains a legal possibility.²⁸⁴

Should the government regress to focusing on ancestry as opposed to nationality as a touchstone for registration, a number of obstacles

280. *Id.* at 218 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943)); *see also* *Yasui v. United States*, 320 U.S. 115 (1943) (affirming the validity of exclusion orders against Japanese-Americans).

281. J.L. DEWITT, HEADQUARTERS WESTERN DEFENSE COMMAND & FOURTH ARMY, PRESIDIO OF SAN FRANCISCO, CALIFORNIA, PUBLIC PROCLAMATION NO. 1 (Mar. 2, 1942), [http://www.javadc.org/images/archivedocs/1942-03-02%20WDC%20Public%20Proclamation%20No1-Establish%20Military%20Zones%20\(28%20pages%20of%20exhibits,notes,%20maps%20not%20scanned\)%20Pgs3_ck.pdf](http://www.javadc.org/images/archivedocs/1942-03-02%20WDC%20Public%20Proclamation%20No1-Establish%20Military%20Zones%20(28%20pages%20of%20exhibits,notes,%20maps%20not%20scanned)%20Pgs3_ck.pdf). The commission concluded that no evidence supported the claim of military necessity for internment, and that it was instead the result of "race prejudice, war hysteria and a failure of political leadership." *See* PERSONAL JUSTICE DENIED 18 (1982), <https://www.archives.gov/research/japanese-americans/justice-denied>. President Ford terminated the Order in 1974, calling it a "setback to fundamental American principles" and urging the Nation to "resolve that this kind of action shall never again be repeated." Proclamation No. 4417, 41 Fed. Reg. 7741 (Feb. 20, 1976).

282. PERSONAL JUSTICE DENIED, *supra* note 281, at 18.

283. YAMAMOTO ET AL., *supra* note 18, at 401; *see also* Proclamation No. 4417 (repealing Executive Order 9066 that was issued by President Roosevelt to initiate and authorize internment of Japanese citizens and noncitizens).

284. *See generally* Saito, *supra* note 226.

would stand in the way.²⁸⁵ Government officials would have to explain why a special registry would not include Americans of European descent in light of Al Qaeda member John Walker Lindh and White supremacist terrorists' illegal acts.²⁸⁶ Furthermore, excluding U.S. citizens of Jewish and Christian faith with ancestral origins in Muslim majority countries would expose the religious motivations behind a prospective registry.²⁸⁷

Whether the United States is in a state of war and evidence that ancestry makes a person more susceptible to espionage or sabotage were dispositive factors in the Japanese curfew and internment cases. These factors are irrelevant in the contemporary era wherein non-state international terrorists recruit nationals from across the world to attack people of myriad faiths and nationalities.²⁸⁸ Factually, the government could not prove that millions of Americans are more likely to become terrorists on account of their ancestry. Indeed, courts noted in the Muslim ban cases the government's findings that nationality, much less ancestry, are not reliable indicators of terrorist membership.²⁸⁹ Unless the courts accept racist notions that certain

285. See, e.g., *Narenji v. Civiletti*, 617 F.2d 745, 749 (D.C. Cir. 1979) (MacKinnon, J., concurring) ("The status of Iranian aliens cannot be disassociated from their connection with their mother country since the alien 'leaves outstanding a foreign call on his loyalties which international law not only permits our Government to recognize but commands it to respect.'" (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 585–86 (1951))).

286. ARIE PERLIGER, THE COMBATING TERRORISM CTR. AT WEST POINT, CHALLENGERS FROM THE SIDELINES: UNDERSTANDING AMERICA'S VIOLENT FAR-RIGHT 100 (2012); *Domestic Threat: White Supremacy Extremism*, FBI (May 22, 2012), <https://www.fbi.gov/news/stories/domestic-threat>; see also Aziz, *supra* note 11, at 274 (discussing the absence of countering violent extremism programs for White and Christian American communities despite the rise of White supremacist violence inspired by Christian theology).

287. ARAB AM. NAT'L MUSEUM, ARAB AMERICANS: AN INTEGRAL PART OF AMERICAN SOCIETY 13–15 (2010), http://www.arabamericanmuseum.org/umages/pdfs/resource_booklets/AANM-ArabAmericansBooklet-web.pdf (noting that a 2002 Zogby Poll found that 63% of Arabs in America are Christian).

288. *Id.*; Dominic Dudley, *The Ten Countries Most Affected by Terrorism*, FORBES (Nov. 18, 2016, 7:08 AM), <https://www.forbes.com/sites/dominicdudley/2016/11/18/countries-most-affected-by-terrorism/#e5f4a2230d9c>; Richard Florida, *The Geography of Foreign ISIS Fighters*, CITYLAB (Aug. 10, 2016), <https://www.citylab.com/equity/2016/08/foreign-fighters-isis/493622/> (citing a report by economists who identified at least 45 countries from which ISIS recruit fighters).

289. See generally U.S. DEP'T OF HOMELAND SEC., CITIZENSHIP LIKELY AN UNRELIABLE INDICATOR OF TERRORIST THREAT TO THE UNITED STATES, <https://assets.documentcloud.org/documents/3474730/DHS-intelligence-document-on-President-Donald.pdf>; Alex

groups are categorically more prone to criminal activity than others, the government would have to find more particularized proof that a U.S. citizen whose ancestors are from a certain country is a national security risk.

Finally, in contrast to the 1940s, the legal authority for internment of U.S. citizens must now come from Congress, not the executive branch. In 1971, Congress enacted 18 U.S.C. § 4001(a), providing that “[n]o citizen shall be . . . detained by the United States except pursuant to an Act of Congress.”²⁹⁰ Although this makes it less likely that American Muslims will be subjected to mass internment, the statute does not offer the same protections to immigrant and nonimmigrant Muslims in the United States.

CONCLUSION

Examining the legality of a Muslim registry is not merely an academic exercise. The alarming rise in anti-Muslim bias since the 9/11 terrorist attacks contributed to the travel ban issued by the Trump administration.²⁹¹ Despite candidate Trump’s multiple statements of his intent to bar Muslims from the United States, many Americans were surprised by his sweeping executive order issued days after he took office. The xenophobic campaign rhetoric had translated into national policy. For this reason, the grassroots protests and litigation in the courts were an organic reaction, and one that arguably affected judges’ refusal to enforce the executive order.

Although litigation reigned in the scope of the third amended executive order, the Muslim Ban was the rare occasion when courts refused to grant the executive heightened judicial deference in

Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, POL’Y ANALYSIS, Sept. 13, 2016, at 1, https://object.cato.org/sites/cato.org/files/pubs/pdf/pa798_2.pdf.

290. 18 U.S.C. § 4001(a) (2012).

291. See BRIAN LEVIN, CTR. FOR THE STUDY OF HATE & EXTREMISM, HATE CRIME IN THE UNITED STATES: 20 STATE COMPILATION OF OFFICIAL DATA (Kevin Grisham ed., 2016); *Anti-Muslim*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/anti-muslim> (noting a 197% increase in the total number of anti-Muslim hate groups up from 2015) (last visited Dec. 26, 2017); Katayoun Kishi, *Anti-Muslim Assaults Reach 9/11-Era Levels, FBI Data Show*, PEW RES. CTR. (Nov. 21, 2016), <http://www.pewresearch.org/fact-tank/2016/11/21/anti-muslim-assaults-reach-911-era-levels-fbi-data-show/>. See generally Cynthia Lee, *Hate Crimes and the War on Terror* (George Washington Univ. Legal Studies Research Paper No. 442, 2008) (describing both public and private hate crimes committed after 9/11).

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national security cases. That Trump's anti-Muslim animus was so explicit distinguished his actions from preceding presidents, giving plaintiffs an advantage in court. The same animus is likely to lead to further government action infringing on the rights of Muslims, including through a Muslim registry. Even though the Trump administration bolstered references to national security and added North Korea and Venezuelan diplomats in the third version of the Muslim ban, the change in language does not reflect a change in motives.

Trump still believes terrorism is exclusively a Muslim problem. His anti-Muslim tweets as President show he has not had a sudden change of heart when it comes to his distrust of Muslims. For example, on August 17, 2017, Trump tweeted after a terrorist attack in Barcelona, Spain that people should "study what Gen. Pershing of the United States did to terrorists when caught. There was no more Radical Islamic Terror for 35 years." He was referring to a false story claiming that Pershing stopped terrorism in the Philippines by shooting Muslim insurgents with bullets dipped in pigs' blood. His message was clear: kill, expel and bar Muslims from your country if you want to be safe. Similarly, on November 29, 2017, President Trump re-tweeted three inflammatory videos by a far-right anti-Muslim British group. To his 43 million followers, he imprinted his presidential stamp of approval for "VIDEO: Islamist mob pushes teenage boy off roof and beats him to death!"; "VIDEO: Muslim Destroys a Statue of Virgin Mary!"; and "VIDEO: Muslim migrant beats up Dutch boy on crutches!"²⁹²

In light of these communications directly from the President of the United States, the government will face significant evidentiary hurdles in proving a counterterrorism registry targeting persons based on their Muslim faith is rationally related or narrowly tailored to protect national security. Likewise, a de facto Muslim registry targeting certain immigrants will not find support in the facts. By its own admission, the government cannot find a relationship between terrorism and national origin. Nor can it prove that certain factors predict a person's engagement in terrorism.

Nevertheless, opposition to racialized counterterrorism programs

292. Laura Smith-Spark, *Britain First, the Far-Right Anti-Muslim Group Retweeted by Trump*, CNN (Nov. 29, 2017, 1:38 PM), <http://www.cnn.com/2017/11/29/europe/uk-politics-britain-first-trump/index.html>.

including a Muslim registry cannot be resolved only in a court of law. To the contrary, the court of public opinion significantly affects the Executive's stance on addressing violence. Indeed, it is no coincidence that over half of Trump's supporters view Muslims as terrorists and per se threats to national security; and as a result, he is emboldened to issue travel bans dripping with religious animus.²⁹³ All the while, violence committed by White supremacists and mass shootings by white males is treated as an acceptable price for freedom of speech and the right to bear arms. Whites as a group are not treated as a threat to public safety. Such contradictions in the exercise of state power are all the more reason for civil rights and liberties advocates to anticipate further anti-Muslim programs should another major terrorist attack on U.S. soil occur by a self-described Muslim.

Invidious special registration programs not only impose dignitary harms arising from stigmatization, but also set the stage for internment. The registration records of hundreds of thousands of people facilitates a government internment program that will predictably be demanded by growing chorus of right wing politicians and extremist organizations.²⁹⁴ Though many Americans would like to believe such possibilities are unduly alarmist, the Muslim ban cases have shown that what we once believed was farfetched is now plausible.

293. Sean McElwee & Philip Cohen, *The Secret to Trump's Success: New Research Sheds Light on the GOP Front-Runner's Stunning Staying Power*, SALON (Mar. 18, 2016, 10:34 AM), https://www.salon.com/2016/03/18/the_secret_to_trumps_success_new_research_sheds_light_on_the_gop_frontrunners_stunning_staying_power/ (showing that over 40% of Trump supporters believe that "violent" describes Muslims extremely well, and 18% believe it describes Muslims very well).

294. Shaun King, *KING: Trump Supporters Are Calling for Muslim Internment Camps*, DAILY NEWS (June 7, 2017, 12:18 PM), <http://www.nydailynews.com/news/national/king-trump-supporters-calling-muslim-internment-camps-article-1.3228321>.